No. 94-1988-CSX (10) Title: Camps Newfound/Owatonna, Inc., Petitoner
v.
Town of Harrison, Maine, et al.

Docketed: June 2, 1995 Court: Supreme Judicial Court of Maine

Entry	Date	Proceedings and Orders
	Jun 2 1995	Petition for writ of certiorari filed.
	Jun 27 1995	Brief of respondents Town of Harrison, et al. in opposition filed.
	Jul 5 1995	DISTRIBUTED. September 26, 1995
	Jul 13 1995	Reply brief of petitioner filed.
	Feb 21 1996	REDISTRIBUTED. February 23, 1996
	Feb 26 1996	REDISTRIBUTED. March 1, 1996
	Mar 4 1996	Petition GRANTED. SET FOR ARGUMENT October 9, 1996. **********
	Mar 25 1996	Record filed.
	Apr 1 1996	Order extending time to file brief of petitioner on the merits until May 10, 1996.
	May 10 1996	Joint appendix filed.
	May 10 1996	Brief amici curiae of American Council on Education, et al. filed.
	May 10 1996	Brief of petitioner Camps Newfound/Owatonna Inc. filed.
	May 10 1996	Brief amici curiae of Christian Legal Society, et al. filed.
	Jun 12 1996	Brief of respondents Town of Harrison, et al. filed.
	Jul 17 1996	Reply brief of petitioner Camps Newfound/Owatonna, Inc. filed.
	Aug 20 1996	CIRCULATED.
	Oct 9 1996	ARGUED.

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,
v.
TOWN OF HARRISON, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Maine Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

WILLIAM H. DEMPSEY *
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
* Counsel of Record

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD
GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

June 2, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

4908

QUESTION PRESENTED

Whether a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), violates the Commerce Clause because it deprives "benevolent and charitable" non-profit institutions of otherwise available property tax exemptions if they are "conducted or operated principally for the benefit of persons who are not residents of Maine."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION AND STATUTES:

LEGISLATIVE MATERIALS:

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
*Respondents.**

Petition for Writ of Certiorari to the Maine Supreme Judicial Court

---

PETITION FOR WRIT OF CERTIORARI

Camps Newfound/Owatonna respectfully petitions for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court (App. A 1a-8a) is reported at 655 A.2d 876 (1995). The opinion of the Maine Superior Court (App. B 9a-19a) is unreported.[1]

JURISDICTION

The Supreme Judicial Court entered its judgment on March 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

---

* The other respondents are the Town's assessors and its tax collector.

[1] The opinion of the Supreme Judicial Court of Maine is set forth in Appendix A, the opinion of the Superior Court in Appendix B, the Maine statute in Appendix C, and the legislative history of the statute in Appendix D.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 652(1)(A)(1) of Title 36 of the Maine Revised Statutes, Me. Rev. Stat. Ann. tit. 36, § 652 (1)(A)(1) (1964 & Supp. 1994) (App. C), provides that property tax exemptions otherwise available to "benevolent and charitable" institutions are to be denied any such institution "that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine."

Article I, Section 8, Clause 3 of the United States Constitution provides that "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States," and Article VI provides that "This Constitution . . . shall be the supreme Law of the Land."

STATEMENT

Petitioner is a Maine non-profit corporation that operates a summer camp for Christian Science children in the Town of Harrison, one of the Respondents. App. A 1a-2a.[2] The only Christian Science camp in New England, petitioner recruits across the country to fill its rolls. R. 42.[3] Accordingly, its campers have come predominantly—about 95%—from outside Maine. App. A 2a-3a.

Because so many of its campers are non-residents, petitioner was denied exemption from property taxes under a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1) (App. C), that deprives otherwise qualified "benevolent and charitable" organizations of such exemptions if they are conducted "principally for

[2] The other respondents—the Town's assessors and its tax collector—do not include the State, which intervened as a defendant in the trial court but did not join the other defendants' appeal from that court's decision. App. A 1a n.1.

[3] We cite the record before the Supreme Judicial Court as "R."

the benefit of persons who are not residents of Maine."[4] In 1992, petitioner brought suit in state Superior Court challenging the statute on the ground, *inter alia*, that it is repugnant to the Commerce Clause. App. B 11a.

The taxes for each of the three years (1989-1991) under review were, from petitioner's perspective, substantial, averaging approximately $20,000. *Id.* at 10a-11a. Petitioner operates at a substantial deficit, which is made up through contributions. R. 38.

The trial court granted summary judgment for petitioner, holding the statute incompatible with the Commerce Clause. Viewing the provision as one "directly discriminat[ing] against interstate commerce," the court judged it under the "per se rule of invalidity" it believed was required by this Court's rulings. App. B 18.[5] The court found an adverse impact on interstate commerce in two interrelated respects: First, the statute conferred "a comparative economic advantage [upon] institutions which provide services primarily to Maine residents in contrast to the economic disadvantage it imposes on those which provide services primarily to out-of-state residents." *Id.* at 15a. Second, there was in consequence an adverse effect upon interstate travel. *Id.* at 14a-15a & n.2, 16a-17a.[6] No difference in public services afforded to the various camps was claimed. *Id.* at 15a. And the plea

[4] The statute also requires that fees exceed $30.00 per week on average, as petitioners' fees did. App. A 2a-3a & n.4.

[5] The court cited in particular the opinion in *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009, 2014-15 (1992). *Id.*

[6] "Inescapably, the direct effect of the denial . . . is to make the cost of providing services to out-of-state residents more expensive, resulting in higher service fees or fewer services." *Id.* at 17a. Defendants did not "contest plaintiff's statement . . . that '[T]o some extent, the cost of the property taxes is passed along to the campers in the form of increased tuition.' . . . [T]he passage of people across state lines is unmistakably a part of interstate commerce. *See Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964)." App. B 14a n.2.

that the legislature's purpose was "to aid Maine resident campers" rather than "to harm nonresident campers" was immaterial, for the correlative of a disadvantage to interstate commerce is always a benefit of some sort to local interests.[7] *Id.* at 16a. The contention that the adverse impact on interstate commerce is "minimal" fails even on the respondent's calculation of a cost to petitioner of $36.64 per camper per week, "particularly if one considers the aggregate effect"; but, in any event, where a substantial impact on interstate commerce is an "inescapable" consequence of a direct discrimination, that impact need not be measured with precision. *Id.* at 17a & n.4.[8] Finally, where a tax directly discriminates against interstate commerce, it is unnecessary to consider whether there are countervailing local interests and whether they could be secured by nondiscriminatory means.[9] In any case, the asserted purpose of "foster[ing] local benefits" would "not [be] thwarted by extending the tax exemption to institutions which serve out-of-state residents." *Id.* at 19a.

On appeal—which the State, though a defendant in the Superior Court, declined to join (App. A 1a n.1)—the Supreme Judicial Court (the "Law Court") reversed the

---

[7] Citing *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 273 (1984): "A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden upon the one party, but rather the intent was to confer a benefit on the other."

[8] "In *Maryland* v. *Louisiana*, the Court refused to allow for more evidence concerning the extent of the discrimination. 'We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' 451 U.S. 725, 760 (1981). It follows from this assertion that the fact of discriminaton against interstate commerce, rather than its extent, is the primary consideration . . . ." *Id.*

[9] Citing, *inter alia*, *Bacchus Imports*, 468 U.S. 263; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); and *Maryland* v. *Louisiana*, 451 U.S. 725. *Id.* at 18a.

trial court and upheld the statute.[10] App. A at 8a. Instead of applying the "per se rule of invalidity" with the burden of justification on the State, the court adopted a "flexible approach" under which the broad issue was "whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* at 4a-5a.[11] Moreover, citing Maine precedent,[12] the court placed a "heavy burden of persuasion" on petitioners. *Id.* at 7a. While acknowledging that this Court has recently stated that "this lesser scrutiny is only available 'where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade,'"[13] the Law Court held that there was no such discrimination here but that rather the statute "regulates evenhandedly." That is so because it "does not favor in-state camps over out-of-state competitors." Instead, it "treats all Maine charities alike." *Id.* at 5a-6a.

On the balancing test, the court concluded, the statute passes. The purpose of the exemption was "to relieve the charit[ies] from the burden of taxes . . . and thereby to recognize and promote the public benefits that they provide"—"a legitimate state interest." *Id.* at 6a. And the court found no burden on interstate commerce. The statute has no effect on out-of-state organizations; and, given petitioner's religious character, "nothing in the

---

[10] We refer to the Superior Court as the "trial court" and, following local practice, to the Supreme Judicial Court as the "Law Court."

[11] Citing *Brown-Forman Distillers* v. *New York Liquor Auth.*, 476 U.S. 573, 579 (1986) (a "flexible approach" to be taken as to a statute that "has only indirect effects on interstate commerce and regulates evenhandedly").

[12] *Maine Milk Producers* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984).

[13] *Chemical Waste Management*, 112 S. Ct. at 2014 n.5.

record suggests that [it] *competes* with other summer camps." *Id.* at 5a-7a. Moreover, while admittedly there is evidence that the increased costs to petitioner were partly passed along in increased fees, "there is no evidence that the exemption statute impedes interstate travel or that Camps provides services that are necessary for interstate travel." *Id.* at 7a.

REASONS FOR GRANTING THE WRIT

The argument for review is simple and, we submit, substantial. As to the merits, that argument is made in large measure merely by quotation of the challenged statute. That law deprives Maine "benevolent and charitable institutions" that are conducted "principally for the benefit of persons who are not residents of Maine" of property tax exemptions to which they would otherwise be entitled. It is the interstate aspect of their operations alone that bars the benefit. The legislative history of the provision discloses no purpose for this discrimination other than that evident on its face—the desire to secure tax revenue in virtue of interstate activities while holding harmless identical local activities. Nor is there ground for postulating some other, unmentioned, redemptive purpose.

In such circumstances, under this Court's decisions the constitutional infirmity of the law is plain. Moreover, if undisturbed, the decision below will be taken as precedent for application of a different Commerce Clause standard in testing state and local tax provisions relating to non-profit organizations than the Court applies with respect to other types of enterprise. Given the amplitude of the resources thereby opened to local levy, the probable response by states and municipalities to such an invitation is predictable.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS.

The analytical difference between the trial court and the Law Court that led to their different conclusions was the application by the trial court, on the one hand, of the "strictest scrutiny" standard prescribed by this Court where a statute plainly discriminates against interstate commerce, and the choice by the Law Court, on the other hand, of the "more flexible" balancing test appropriate where there is no such clear discrimination. We submit that the trial court was incontestably correct both in its election of the governing standard and in its application of that standard.[14]

The relevant principles, together with the major precedents, were summarized by this Court recently in a decision relied upon by the trial court, *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992).[15] In that case, the Court struck down a state law that imposed a fee on the disposal of hazardous waste generated outside of, but not within, the state. Taxes that "facially dis-

[14] This is not to suggest that the statute would be valid if properly evaluated under the "more flexible" balancing test. It would not. The factors we discuss relating to impact on interstate commerce, local interests, and alternatives would require a declaration of invalidity on that test as well. The Law Court's error in electing the balancing test was compounded by its imposition of a "heavy burden of persuasion" on petitioner (*supra* p. 5), thereby disregarding this Court's rule under which, even where there is statutory "facial neutrality," the burden is on the state. *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 352, 353 (1977). But we focus upon the choice of tests because of the precedential importance of that election.

[15] For a substantially identical summary, see the subsequent and related opinion in *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345, 1350-51 (1994). For other relevant decisions after *Chemical Waste Management*, see *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205 (1994); *C & A Carbonne, Inc.* v. *Town of Clarkstown*, 114 S. Ct. 1677 (1994); and *Associated Indus.* v. *Lohman*, 114 S. Ct. 1815 (1994).

criminate[]" against interstate commerce in such fashion, the Court declared, "are generally forbidden" and are "typically struck down without further inquiry." *Id.* at 2013-14.[16] "'At a minimum, such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.'" *Id.* at 2014.[17] And "the burden falls on the State." *Id.*[18] There must be "'some reason, apart from their origin, to treat [the articles of commerce] differently.'" *Id.* at 2015.[19] While the Court has applied a "more flexible approach" involving "lesser scrutiny" in certain cases, that test is "only available 'where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade.'" *Id.* at 2014 n.5.[20]

The applicability of these principles to the statute here at issue would appear obvious. A law that denies a tax exemption only to organizations that are "operated principally for the benefit of persons who are not residents of Maine" surely "facially discriminates." And it is established that denial of a tax exemption is the functional,

---

[16] Citing *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984); *Walling* v. *Michigan*, 116 U.S. 446, 455 (1886); *Guy* v. *Baltimore*, 100 U.S. 434 (1880); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 406-07 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725; and *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336-37 (1977).

[17] Quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979).

[18] Citing *Hunt*, 432 U.S. at 353; *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2026-27 (1992); and *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278-79 (1988).

[19] Quoting *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 626-27 (1978); citing also *New Energy Co.*, 486 U.S. at 279-80.

[20] Quoting *City of Philadelphia*, 437 U.S. at 624; citing also *Brown-Forman Distillers Corp.*, 476 U.S. 573, and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

and therefore the Constitutional, equivalent of imposition of a tax.[21] Moreover, as the trial court held, the other essential elements of constitutional invalidity are clearly present: First, the adverse impact of the discrimination upon petitioner by virtue of its participation in interstate commerce, as well as upon potential and actual interstate travelers, is evident.[22] Second, such travel is a component of interstate commerce within the meaning of the Commerce Clause.[23] Finally, even on the highly dubious as-

---

[21] *Maryland* v. *Louisiana*, 451 U.S. at 756 ("[T]he Louisiana First-Use Tax unquestionably discriminates against interstate commerce . . . as the necessary result of various tax credits and exclusions."); *Westinghouse Elec. Corp.*, 466 U.S. at 399-400 & n.9; *Bacchus Imports*, 468 U.S. 263 (excise tax exemption favoring local beverage interests); *I.M. Darnell & Son Co.* v. *City of Memphis*, 208 U.S. 113 (1908) (property tax exemption favoring local manufacturers); *West Lynn Creamery*, 114 S. Ct. at 2220 (concurring opinion, Scalia, J.) (an "'exemption' from or 'credit' against a 'neutral' tax, is no different in principle from [a discriminatory tax], and has likewise been held invalid"); *New Energy Co.*, 486 U.S. 269 (sales tax credit favoring local product).

[22] In addition to producing the effects noted by the trial court upon fees and services (*supra* p. 3 n.6), the statute provides a strong incentive for camps to curtail out-of-state enrollment by differential fees and quotas.

[23] In the decision cited by the trial court, *Heart of Atlanta Motel*, 379 U.S. at 253-56, involving the constitutionality of federal civil rights public accommodations legislation, this Court traced back to the *Passenger Cases*, 48 U.S. (7 How.) (1849), the doctrine that interstate commerce within the meaning of the Constitution "include[s] the movement of persons through more States than one," and to *Caminetti* v. *United States*, 242 U.S. 470 (1917), the principle that it does not "make any difference whether the transportation is commercial in character." For the leading preemption case, see *Edwards* v. *California*, 314 U.S. 160 (1941). See also *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979) ("*Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-23 (1978), made clear that there is no 'two-tiered definition of commerce.' The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.")

sumption that the state's interest in promoting recreation for resident children may be relevant notwithstanding the statute's plain and purposeful discrimination and even though the legislative history of the provision discloses only a discriminatory fiscal purpose,[24] the outcome would be unaffected. Nondiscriminatory means, *e.g.*, the provision of vouchers to resident families, which could be used at all camps including petitioner's, would serve. Nor, for that matter, would the policy of benefiting residents be frustrated by simply extending the exemption to all camps, as the trial court observed. *Supra* p. 4.

But none of this was obvious to the Law Court. Its effort to avoid the *Chemical Waste* test began with its flat, though unaccountable, rejection of the established equivalence of tax exemptions and taxes. App. A 4a.[25] It passed then to an unsupported and insupportable denial of the evident discriminatory purpose and effect of the

[24] So far as revealed by the legislative debates (App. D), the purpose of the provision was simply to raise money from out-of-state interests while protecting in-state interests, though it was objected that the measure would be "discriminating against the people who come to our state." *Id.* at 22a. Thus, the "most important reason for the bill . . . is approximately seven hundred thousand dollars spent all over the State of Maine on taxes to the towns . . ," and "there are a great many hardships that are caused on some of the municipalities by the exemption of taxes. I don't believe that this will affect any business that is in the State run by anybody that is in this State." *Id.* at 28a. The provision is "for institutions that are set up within the State of Maine by out-of-state people for out-of-state people." *Id.* at 22a. This is a paradigm of the sort of parochial purpose against which the Commerce Clause was directed.

[25] In the following, to us impenetrable, passage:

> "Tax exemptions are characterized in Maine's tax statutes as 'tax expenditures.' . . . The exemption statute does not impose a tax; it exempts nonprofit corporations that choose to meet certain standards from a tax that all other taxpayers must pay. In effect, the Legislature has decided to expend tax dollars, via an exception, to 'purchase' charitable services from nonprofit organizations." *Id.*

statute. Thus, the court stressed that the statute "does not favor in-state camps over out-of-state competitors" *Id.* at 5a. But that is typical, as this Court has quite recently observed. "State taxes are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." *West Lynn Creamery, Inc.* v. *Healey*, 114 S. Ct. 2205, 2216 (1994). See also, *e.g.*, *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345 (1994); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992).

As among Maine camps, the Law Court declared the discrimination immaterial because, in view of petitioner's dedication to Christian Science children, "nothing in the record suggests that [petitioner] *competes* with other summer camps" (App. A 6a)—a purported justification with unfortunate "free exercise" overtones. Apart from the obvious fact that, whether or not petitioner attracts campers of other faiths, other camps are open to Christian Science families, the court paid no heed to the impact of the statute upon interstate travel, noting merely that there was no proof that such travel had actually been impeded. *Id.* at 7a.[26] But, as the trial court pointed out (*supra* p. 4), it is enough under this Court's decisions to show a significant discriminatory tax levy on interstate commerce.[27] If a *de minimus* exculpation can be imagined, surely this was not such a case.

The short of it is that the decision below plainly collides with this Court's interpretation of a key constitutional foundation of federalism, and review should be granted for that reason alone. The error is so palpable,

[26] It should be noted also that there are other camps of an unspecified number, nondenominational so far as appears, that also fall within the statutory exclusion. R. 42-43.

[27] See also *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 41-42 & n.8 (1980).

moreover, that we suggest this is one of those exceptional cases in which summary reversal would be in order. The issue is not one that will benefit by further consideration by lower courts. There has already been more than sufficient exegesis of the "dormant" Commerce Clause in this Court for disposition of this case.[28]

Our argument for review, however, is not based simply upon the Law Court's misconstruction of the Constitution. It is based also upon the significance of that misconstruction, the question to which we now turn.

II. THE DECISION BELOW, IF PERMITTED TO STAND, WOULD LIKELY TRIGGER WIDESPREAD EFFORTS IN THE STATES TO LAY DISCRIMINATORY TAX BURDENS UPON NON-PROFIT ORGANIZATIONS BY VIRTUE OF THEIR INTERSTATE ACTIVITIES.

In light of the increasing fiscal pressure upon states and localities in recent years, it is not surprising that the question of tax exemptions for non-profit organizations has received ever greater attention.[29] With the strength

[28] The decision below so sharply departs from this Court's rulings as to suggest the sort of undue deference to state legislatures by state courts that underlay this Court's pre-1988 appellate jurisdiction. Doubtless such instances are so rare that certiorari affords sufficient protection. It is relevant to note in this connection that, because of 28 U.S.C. § 1341 respecting state tax injunction actions, petitioner was unable to bring this suit in federal court.

We note that, should the decision below be reversed, there would remain for decision by the lower court the question of the justiciability of petitioner's claim for relief, including damages, under 42 U.S.C. § 1983. The dismissal of that claim by the trial court on grounds that the municipal defendants could not be held liable for enforcing a state statute (R. 169-70) conflicts with *Venuti* v. *Riordan*, 702 F.2d 6, 8 (1st Cir. 1983) (Breyer, J.), and *Grendel's Den, Inc.* v. *Larkin*, 749 F.2d 945, 958-59 (1st Cir. 1984).

[29] "Obtaining and maintaining exemptions from real property taxes has been one of the more controversial issues in recent years . . . . [M]any local governments, traditionally heavily dependent on real property taxes for revenue, have seen their revenue base

of the current movement to shift fiscal responsibility for funding governmental programs from the federal government to the states, there will doubtless be further impetus for efforts to curtail such exemptions.

So far as we can tell, these legislative initiatives, though quite varied, have not yet included the lifting of exemptions on account of interstate activities.[30] Presumably that is due, at least in part, to the Constitutional dubiety of any such move. If the decision below is permitted to stand, there is every reason to suppose that legislatures will accept the apparent invitation. While the Law Court's opinion is scarcely without ambiguity, it is clear enough that the court was searching for a rationale that would distinguish this case from this Court's prior decisions on the basis of the public service character of non-profit organizations like petitioner.[31] And while there is no basis in any of those decisions for drawing such a distinction, it is true that none of them involved non-profit organizations. Moreover, if review is denied, the precedent afforded by the Law Court's decision might be coupled with inferences, however unjustified, from *United States* v. *Lopez*, 63 U.S.L.W. 4343 (Apr. 26, 1995), in support of limitation of the principles heretofore established with respect to the reach of the "dormant" Commerce Clause.

The incentive to take advantage of this possible opening would be strong, since the potential addition to the

eroded by real property tax exemptions." F. Hill & B. Kirschten, *Federal and State Taxation of Exempt Organizations* ¶ 14.04[3][a] at 14-7 - 14-8 (1994).

[30] See Hill & Kirschten, *supra* note 29.

[31] This is presumably the meaning of the court's reliance upon the "legitimate state interest" in "promot[ing] the public benefits" provided by "charit[ies]," and the characterization of the statute as a decision by "the Legislature . . . to expend tax dollars, with an exemption, to 'purchase' charitable services from non-profit organizations." App. A 4a, 6a.

public purse would be enormous. The targets would include, for example, most, if not all, major private colleges and universities; a host of museums and galleries, many likely to be located in cities with acute budgetary problems; and a broad array of other scientific, literary, and educational organizations.[32]

This invitation should not issue.

CONCLUSION

If, as we believe, there is no basis for treating nonprofit exempt organizations differently than other organizations, the decision below collides so squarely with this Court's decisions and threatens such mischief that review should be granted, with summary reversal an appropriate disposition. If, on the other hand, there might be basis for such a differentiation, certiorari should be granted for plenary review of this question, which would surely be an important one.

Respectfully submitted,

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD
GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

WILLIAM H. DEMPSEY *
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
* Counsel of Record

June 2, 1995

---

[32] Indeed, Maine is home to several colleges of national standing whose non-resident student population might well endanger the tax exemption provision governing such institutions. Me. Rev. Stat. Ann. tit. 36, § 652(1)(B). See *Lovejoy's College Guide* pp. 504-06 (C.T. Straughn & B.L. Straughn eds., 22d ed. 1993) (Bates, 88% of freshman from out of state; Bowdoin, 87%; Colby, 87%).

APPENDICES

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Law Docket No. CUM-94-336

CAMPS NEWFOUND/OWATONNA, INC.

v.

TOWN OF HARRISON *et al.*

Argued October 31, 1994
Decided March 7, 1995

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, and DANA, JJ.

DANA, J.

The Town of Harrison [1] appeals from a summary judgment (Cumberland County, *Lipez, J.*) in favor of Camps Newfound/Owatonna, Inc., a Maine nonprofit corporation, declaring that Maine's property tax exemption statute. 36 M.R.S.A. § 652(1)(A)(1) (Supp. 1994), violates the Commerce Clause of the United States Constitution. Camps cross appeals the court's denial of its constitutional challenge based upon the Privileges and Immunities Clause of the United States Constitution and the

---

[1] The defendants are the Town of Harrison, the five individuals who serve as the Town's assessors, and the individual who serves as the Town's tax collector. The State intervened as a party defendant and filed a cross-motion for a summary judgment in the Superior Court, but did not appeal.

Equal Protection Clauses of the United States and Maine Constitutions. Because we find the statute constitutional, we vacate the judgment and remand for entry of a summary judgment for the Town.[2]

Camps operates a summer camp in Harrison for children of the Christian Science faith. In April 1992, by a letter to the Harrison Board of Assessors,[3] Camps demanded a tax refund for 1989 through 1991 and a continuing tax exemption pursuant to Maine's charitable tax exemption statute, 36 M.R.S.A. § 652(1)(A)(1) (Supp. 1994). The statute denies property tax exemptions, otherwise available, to nonprofit institutions that are "in fact conducted or operated principally for persons who are not residents of Maine and [make] charges that result in an average weekly rate per person . . . in excess of $30."[4] Between 1989 and 1992, approximately 95% of

[2] Additionally, Camps appeals the Superior Court's (Cumberland County, *Perkins, J.J.* dismissal of count II of its complaint setting forth its claim for relief pursuant to 42 U.S.C. §§ 1983 and 1988. The Town and its representatives also brought a summary judgment motion arguing that Camps' constitutional claims were barred by *res judicata*, waiver, and/or collateral estoppel; the Superior Court (Cumberland County, *Lipez, J.*) denied this motion, and the Town appeals. Because we find the exemption statute constitutional in all respects, it is not necessary to discuss these other issues raised by the parties.

[3] In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 604 A.2d 908 (Me. 1992), we denied Camps' appeal of a partial tax abatement for 1989 granted by the Harrison Board of Assessors. Camps' 1989 abatement application and subsequent appeals were based on the alleged overvaluation of Camps' property and, specifically, the assessor's failure to adjust the valuation to reflect the existence of a 25-year conservation easement that Camps had placed on the property. Camps did not assert any constitutional challenges.

[4] 36 M.R.S.A. § 652(1)(A)(1) (Supp. 1994) provides:

> Any such institution which is in fact conducted or operated principally for the benefit of persons who are not residents of Maine is entitled to exemption not to exceed $50,000.00 of current just value only when the total amount of any stipends or charges which it makes or takes during any tax year, as defined by section 502, for its services, benefits or advantages during the same tax year does not result in an average rate in excess of 30.00 per week . . . No such institution which is in fact conducted or operated principally for the benefit of persons who are not residents of Maine and makes charges which result in an average weekly rate per person, as computed under the subparagraph, in excess of $30.00 may be entitled to tax exemption. This subparagraph does not apply to institutions incorporated as nonprofit corporations for the sole purpose of conducting medical research.

the campers were out-of-state residents, most of whom paid weekly fees ranging from $370 to $445. Following the refusal of the Board of Assessors to grant the exemption in June 1992. Camps filed its complaint in the Superior Court challenging the board's decision and in April 1993 moved for a summary judgment on its constitutional claims.

Standards

Summary judgment is appropriate if "there is no genuine issue as to any material fact" and the moving party "is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). We review the evidence before the Court in the light most favorable to the party against whom the judgment was granted to determine if the trial court committed an error of law. *Dube v. Homeowners Assistance Corp.*, 628 A.2d 1040, 1041 (Me. 1993). "All legislative enactments are presumed constitutional, and the party challenging the constitutionality of a statute bears the burden of proof. This presumption, however, is not absolute; legislation which violates an express mandate of the constitution is invalid even though it is expedient or is otherwise in the public interest." *Maine Beer & Wine Wholesalers v. State*, 619 A.2d 94, 97 (Me. 1993) citations omitted); *see also Spiller v. State*, 627 A.2d 513, 515 (Me. 1993). "[S]tatutes . . . will be construed, where possible, to preserve their constitutionality [and the] . . . party attacking the constitutionality of a state stat-

ute . . . carries a heavy burden of persuasion." *Maine Milk Producers v. Commissioner of Agric.*, 483 A.2d 1213, 1218 (Me. 1984) (citations omitted); *see Eastler v. State Tax Assessor*, 499 A.2d 921, 925 (Me. 1985). A statute's unconstitutionality "must be established to such a degree of certainty as to leave no room for reasonable doubt." *Orono-Veazie Water Dist. v. Penobscot City Water Co.*, 348 A.2d 249, 253 (Me. 1975); *e.g., Small v. Gartley*, 363 A.2d 724, 732 (Me. 1976).

Commerce Clause

The Commerce Clause by its terms grants authority to Congress to "regulate Commerce . . . among the several States." U.S. Constitution, Art. I, § 8, cl. 3. It has long been interpreted to forbid the States from discriminating against interstate trade. *Associated Indus. of Missouri v. Lohman*, —— U.S. ——, 62 U.S.L.W. 4391, 4392-93 (1994). This prohibition is often referred to as the "dormant" or "negative" Commerce Clause. The Superior Court found that the exemption statute violates this dormant Commerce Clause. We disagree.

Tax exemptions are characterized in Maine's tax statutes as "tax expenditures." 36 M.R.S.A. § 196 (1990). The exemption statute does not impose a tax; it exempts nonprofit corporations that choose to meet certain standards from a tax that all other taxpayers must pay. In effect, the Legislature has decided to expend tax dollars, via an exemption, to "purchase" charitable service from nonprofit organizations.

The United States Supreme Court has adopted a "two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Aseptic Packaging Council v. State*, 637 A.2d 457, 461 (Me. 1994) (quoting *Brown-Forman Distillers v. N.Y. Liquor Auth.*, 476 U.S. 573, 579 (1986)). The first tier is a "per se rule of invalidity" and the second is a "flexible approach." Under the "per se rule of invalidity" approach, "[w]hen a state

statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [courts] have generally struck down the statute without further inquiry." *Id.* This approach "applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade.'" *Aseptic Packaging Council*, 637 A.2d at 461 (quoting *Chemical Waste Management, Inc. v. Hunt*, —— U.S. ——, 112 S.Ct. 2009, 2015 n.6 (1992), itself quoting *Maine v. Taylor*, 477 U.S. 131, 148 n.19 (1986)).

The Court has adopted a "flexible approach" when the statute "has only indirect effects on interstate commerce and regulates evenhandedly." *Brown-Forman*, 496 U.S. at 580. In those circumstances, the Court examines "whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* The Supreme Court has recently stated that "this lesser scrutiny is only available 'where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade.'" *Chemical Waste*, 112 S.Ct. at 2014 n.5.

Our first step is to determine whether to apply the rule of per se invalidity or to adopt the flexible approach. In order to do so we must decide whether the exemption statute regulates evenhandedly with only incidental effects on interstate commerce or whether, in fact, it does discriminate against interstate commerce. "Discrimination" refers to different treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Oregon Waste Sys. v. Department of Envtl. Quality*, —— U.S. ——, 114 S.Ct. 1345, 1350 (1994).

The exemption statute does not favor in-state camps over out-of-state competitors. Rather, it favors, among in-state camps, those that serve a majority of in-state campers. The case before us demonstrates this point.

Camps is a Maine corporation, and no out-of-state competitor complains that the statute favors in state camps at its expense. Moreover, the exemption statute is not directed at taxes on the persons served by the charity but, rather, on real property taxes for which the charity would otherwise be liable. The exemption statute treats all Maine charities alike. They all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally. If there is any impact on interstate commerce it is incidental; it is not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine. Because the exemption statute regulates evenhandedly with only incidental effects on interstate commerce, we apply the flexible approach, examining whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Brown-Forman*, 496 U.S. at 580.

The purpose of any tax exemption for charitable institutions is to relieve the charity from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide. This is a legitimate state interest. Furthermore, the burden on interstate commerce does not clearly exceed the local benefits. The exemption statute bears no resemblance to the types of economic regulation that "excite those jealousies and retaliatory measures the Constitution was designed to prevent." *See C & A Carbone, Inc.* v. *Town of Clarkstown*, —— U.S. ——, 62 U.S.L.W. 4315, 4317 (1994). The statute neither increases costs to out-of-state firms nor forces them to leave the market.

Indeed, in the case before us nothing in the record suggests that Camps *competes* with other summer camps outside of or within Maine or that Camps has lost business to competitors. Camps is unique, serving a very limited segment of the population who choose to attend Camps because of the religious affiliation and the desirability of the location and the services. Furthermore, Camps delivers its services only within Maine. Camps

does not claim that the exemption statute places it at a competitive disadvantage in attracting campers. Rather, it suggests that paying the taxes precludes it to a certain extent from providing supplemental services for its campers, such as outside art and music consultants. Finally, although the record suggests that the denial of a tax exemption results in increased costs that are passed along "to some extent" to the campers in the form of increased tuition, there is no evidence that the exemption statute impedes interstate travel or that Camps provides services that are necessary for interstate travel. Camps has not met its heavy burden of persuasion that the exemption statute is unconstitutional. *See Maine Milk Producers*, 483 A.2d at 1218.

Equal Protection Clauses

In *Green Acres Baha'i Inst. v. Town of Eliot*, 159 Me. 395, 193 A.2d 564 (1963) (*Green Acres II*), we upheld Maine's charitable tax exemption statute under the equal protection clauses of the Maine and United States Constitutions. The case before us and *Green Acres II* are virtually identical. Neither has the statute materially changed since we decided *Green Acres II*, nor has the equal protection analysis under federal or Maine law so changed as to justify our deviation from *Green Acres II*. *See Whyy, Inc. v. Glassboro*, 393 U.S. 117, 120 (1968) (stating that it is permissible for states to engage in local benefit analysis); *Lambert v. Wentworth*, 423 A.2d 527, 531 (Me. 1980) (stating that not all burdens on the right to travel implicate strict scrutiny analysis). Assuming without deciding that Camps has standing to argue the constitutional rights of the campers, *see Craig v. Boren*, 429 U.S. 190, 194-95 (1976), we find that the exemption statute does not violate the equal protection clause of either the United States or Maine Constitutions.

Privileges and Immunities Clause

Camps also argues that the exemption statute violates the Privileges and Immunities Clause of Article IV, sec-

tion 2 of the United States Constitution which provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Camps argues that the campers' rights to travel and to be free from discriminatory taxation are protected by the Privileges and Immunities Clause.

We find that the exemption statute does not violate the Privileges and Immunities Clause. The campers may pay a slightly higher tuition if they choose to attend Camps, but they are not directly subject to state taxation. Additionally, the exemption statute does not burden any fundamental rights of the campers. In *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978), the Supreme Court rejected a privileges and immunities attack on a Montana scheme for issuing elk-hunting licenses and held that the Privileges and Immunities Clause only applies to distinctions between nonresidents and residents with respect to "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union." *Id.* at 387. An activity must bear "upon the vitality of the Nation as a single entity" before discrimination with respect to it will trigger the Clause. *Id.* at 383. The right to attend a recreational summer camp is not a fundamental right, and therefore the exemption statute does not violate the Privileges and Immunities Clause.

Because we find that the exemption statute is not unconstitutional, it is not necessary to discuss the other issues rasied by the parties on appeal.

The entry is:

> Judgment vacated with respect to count I, and remanded to the Superior Court for entry of a summary judgment for the Town of Harrison. Judgment affirmed with respect to count II.

All concurring.

APPENDIX B

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action

Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA, CORPORATION,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, SUSAN SEARLES, MICHAEL DARCY, PAUL KILGORE, ALBERT HAGGERTY, and ROBERT BAKER, as the Harrison Municipal Officers and Assessors, and MICHAEL THORNE as the Harrison Tax Collector,
Defendants

and

STATE OF MAINE,
Intervenor

DECISION AND ORDER

Before the court are (1) Plaintiff Camps Newfound/Owatonna, Corporation's motion for summary judgment based upon constitutional challenges to Maine's charitable tax exemption statute, (2) Intervenor State of Maine's cross-motion for summary judgment based upon the same constitutional issues, and (3) Defendants Town of Harrison and its tax assessor's and collector's (collectively, Municipal Defendants) motion for summary judgment based

upon the alleged *res judicata*, waiver, and/or collateral estoppel effect of the prior legal action by plaintiff challenging its 1989 partial tax abatement.

BACKGROUND

Plaintiff, a Maine non-profit corporation, operates a summer camp in Harrison, Maine for children of the Christian Science faith. During the years 1989 through 1992, approximately 95% of the campers were out-of-state residents. These campers paid fees ranging from $370.00 per week in 1989 to $445.00 per week in 1992 to attend the camp, except to the extent that they received scholarship aid.

By letter dated April 15, 1992, plaintiff demanded a tax refund for the years 1989 through 1991 and a continuing tax exemption pursuant to Maine's charitable tax exemption statute which denies property tax exemptions, otherwise available, to charitable and benevolent institutions that are "in fact conducted or operated principally for persons who are not residents of Maine" and charge more than $30.00 per week per person. 36 M.R.S.A. § 652(1)(A)(1) (Supp. 1993).[1] Plaintiff pays approxi-

[1] Section 652(1)(A)(1) provides:

> Any such institution that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine is entitled to an exemption not to exceed $50,000 of current just value only when the total amount of any stipends or charges that it makes or takes during any tax year, as defined by section 502, for its services, benefits or advantages during the same tax year does not result in an average rate in excess of $30 per week when said weekly rate is computed by dividing the average yearly charge per person by the total number of weeks in a tax year during which such institution is in fact conducted or operated principally for the benefit of persons who are not residents of Maine. No such institution that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine and makes charges that result in an average weekly rate per person, as computed under this subparagraph, in excess of $30 may be entitled to tax exemption. This subparagraph does not apply to institutions incorporated as nonprofit corporations for the sole purpose of conducting medical research.

mately $20,000.00 per year pursuant to 36 M.R.S.A. § 652(1)(A)(1). Although plaintiff's letter recognized that on the face of the statute it was not entitled to an exemption, plaintiff claimed that the statute was unconstitutional and plaintiff was, therefore, entitled to the exemption. In response to plaintiff's letter, the assessors denied plaintiff's request stating that it was neither the role nor duty of the Board of Assessors to pass judgment on or overrule a state statute.

On June 3, 1992, plaintiff filed a two count complaint against the Municipal Defendants alleging that the charitable tax exemption statute violates the equal protection provision of the Maine Constitution, and the Commerce Clause, the Equal Protection Clause, and the Article IV, section 2 Privileges and Immunities Clause of the U.S. Constitution. Plaintiff requested (1) declaratory and injunctive relief and (2) relief and damages under 42 U.S.C. § 1983. On April 28, 1993, the court (*Perkins, J.*) granted the Muncipal Defendants' motion to dismiss Count II of the Complaint which sought relief under 42 U.S.C. § 1983. Count I, which sought declaratory and injunctive relief from the alleged constitutional violations, survived defendants' motion. On August 3, 1992, the State intervened to defend the constitutionality of Maine's charitable tax exemption statute.

On April 9, 1993, plaintiff brought a motion for summary judgment, and on May 25, 1993, the State brought a cross-motion for summary judgment. Both motions go to the merits of the constitutional claims. On May 28, 1993, the Municipal Defendants brought a summary judgment motion arguing that plaintiff's constitutional claims are barred by *res judicata*, waiver, and/or collateral estoppel because plaintiff could have brought these

claims during plaintiff's prior legal challenge to a partial abatement of their 1989 tax valuation. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 604 A.2d 908 (Me. 1992).

DISCUSSION

I. *Res Judicata, Waiver, Collateral Estoppel*

As a preliminary matter, plaintiff's claims for 1989 and 1990 are not barred by *res judicata,* waiver, or collateral estoppel. While plaintiff did bring a prior 80B action to challenge the Town Board of Assessors' decision to grant a partial tax abatement of its 1989 tax valuation, the Board of Assessors does not have authority to determine the constitutionality of state taxing statutes. It would have been futile for plaintiff to challenge the constitutionality of Maine's charitable tax exemption statute before the Board of Assessors. *See Minster v. Town of Gray,* 584 A.2d 646 (Me. 1990).

II. *Equal Protection*

In *Green Acres Baha'i Inst. v. Town of Eliot,* 159 Me. 359 (1963) ("*Green Acres II*"), the Law Court upheld Maine's charitable tax exemption statute under the equal protection clauses of the Maine and U.S. Constitutions. *Green Acres II* and the present case are virtually identical. Both cases were instituted by nonsecular institutions who would have otherwise qualified for a charitable tax exemption except the majority of their camper patrons resided outside of Maine. The statute has not materially changed since *Green Acres II* was decided. Nor has equal protection analysis under federal or state law so changed as to justify the court's deviation from *Green Acres II* on equal protection grounds. *See WHYY, Inc. v. Borough of Glassboro,* 393 U.S. 117, 120 (1968) (stating that it is permissible for states to engage in local benefit analysis); *Lambert v. Wentworth,* 423 A.2d 527, 532, 534 (Me. 1980) (stating that not all burdens on the right to travel implicate strict scrutiny analysis).

Since *Green Acres II* did not consider a challenge to Maine's charitable tax exemption statute under the Commerce Clause or the Privileges and Immunities Clause, resolution of these new challenges is not dictated by *Green Acres II.* Although disparate treatment of services for in-state and out-of-state residents may be sanctioned on equal protection grounds because services for in-state residents provide greater local benefits, such disparate treatment on local benefit grounds is not necessarily sanctioned under the Commerce Clause or the Privileges and Immunities Clause. The rationale for upholding a tax under an equal protection challenge will not necessarily satisfy other constitutional challenges. Constitutional standards of analysis of different constitutional provisions may vary in order to protect different constitutional interests.

III. *Commerce Clause*

A state tax does not offend the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977). The constitutionality of Maine's charitable tax exemption statute turns on the third factor—whether the statute discriminates against interstate commerce.

In *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617-19 (1981), the Supreme Court analyzed whether the Montana severance tax which was imposed on each ton of coal mined in the State discriminated against interstate commerce. Although the tax burden was borne primarily by non-Montana utilities because 90% of the coal was shipped out-of-state, the tax was held nondiscriminatory. The Court reasoned that the tax was computed at the same rate regardless of its final destination, and the tax burden was borne according to

the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers.

In contrast, the Supreme Court in *Maryland v. Louisiana*, 451 U.S. 725, 753-60 (1981), held discriminatory Louisiana's "first use" tax on gas imported into the State which was not previously subjected to state or federal taxation. The tax was imposed on pipeline companies which brought gas in from the federal Outer Continental Shelf (OCS) to be processed in Louisiana. Most of the OCS gas was then sold to out-of-state consumers. Tax exemptions and credits for the first use tax operated so that Louisana consumers of OCS gas for the most part were not burdened by the tax. However, the tax applied uniformly to gas moving out-of-state. By statute, the first use tax was prohibited from being allocated to any party other than the ultimate consumer. Applying the four part *Complete Auto* test, the Supreme Court held that the first use tax discriminated against interstate commerce. *Id.* at 754-56. The tax provided a direct commercial advantage to local business. *Id.* at 754. Furthermore, the costs charged to compensate the State for the protection and use of its resources were different for local and interstate commerce and, thus, the tax did not provide for equality of treatment between local and interstate commerce. *Id.* at 759.

Maine's charitable tax exemption statute denies property tax exemptions to charitable and benevolent institutions that are "in fact conducted or operated principally for persons who are not residents of Maine" and charge more than $30.00 per week per person. 36 M.R.S.A. § 652(1)(A)(1). Denial of a tax exemption is explicitly and primarily triggered by engaging in a certain level of interstate commerce. This denial makes operation of the institutions serving non-residents more expensive.[2] This

[2] Neither the state nor municipal defendants contest plaintiff's statement of material fact, based on the affidavit of Susan Smith, that "[T]o some extent, the cost of the property taxes is passed along to the campers in the form of increased tuition." Although this increased cost affects people moving across state lines, rather than goods, the passage of people across state lines is unmistakably a part of interstate commerce. *See, Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964).

increased cost results from an impermissible distinction between in-state and out-of-state consumers. *See Commonwealth Edison Co.*, 453 U.S. at 617-19. Although in-state activities may be required to pay their way, a tax must provide for equality of treatment between local and interstate commerce. *Maryland v. Louisiana*, 451 U.S. at 759. Maine's charitable tax exemption is denied, not because there is a difference between the activities of charitable institutions serving residents and non-residents, but because of the residency of the people whom the institutions serve.

Although the exemption is not denied to all charitable institutions that provide services to out-of-state residents, the statute is still discriminatory. It impermissibly creates a comparative economic advantage for institutions which provide services primarily to Maine residents in contrast to the economic disadvantage it imposes on those which provide services primarily to out-of-state residents.[3] Even though charitable institutions are not operated to generate profits, they operate to provide services and may qualify in every other sense as a business. Since economic demands, e.g. taxes, must be met to ensure continued serv-

[3] *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (exemption from liquor tax for only certain types of in-state produced liquor is clearly discriminatory even though it does not apply to all locally produced products; as long as there is some competition between exempt in-state and nonexempt out-of-state products there is a discriminatory effect). *See also Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214, 218 (Me. 1986) (statute discriminatory even though it only discriminates against some, not all, foreign-registered trucks driven in Maine; "Balkanization, even though only partial, is still Balkanization.").

ices, tax exempt status is an economic advantage for institutions primarily serving Maine residents.

The State suggests that the charitable tax exemption statute does not violate the Commerce Clause because the purpose of the tax was to provide local benefits in the form of services to Maine residents. That argument is unavailing:

> The determination of constitutionality does not depend upon whether one focuses upon the benefitted or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden upon the one party, but rather the intent was to confer a benefit on the other.

Bacchus Imports, Ltd. v. Dias, 468 U.S. at 273. Consequently, it is irrelevant to Commerce Clause inquiry that the motivation of the Legislature may have been the desire to aid Maine resident campers and not to harm nonresident campers. *Id.; see Chemical Waste Management, Inc. v. Hunt,* 119 L.Ed.2d 121, 133 n.6 (1992) ("The 'virtually per se rule of invalidity' applies 'not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade.' " (citations omitted)).

Although the State further suggests that the Maine charitable tax exemption is about fostering in-state social benefits through tax exemptions which are the equivalent of tax expenditures, the denial of a tax exemption is fundamentally about raising revenue. Enhancing local benefits through tax policy at the expense of interstate commerce is a matter within the purview of the Commerce Clause, and, despite the State's effort to recharacterize the tax exemption as a tax expenditure, tax exemptions do not escape Commerce Clause analysis. *See*

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (Hawaiian tax exemption from liquor tax for only certain types of in-state produced liquor violates Commerce Clause).

The Municipal Defendants suggest that the impact of the denial of the tax exemption on interstate commerce is too minimal to violate the Commerce Clause.[4] Inescapably, the direct effect of the denial, when all else is equal, is to make the cost of providing services to out-of-state residents more expensive, resulting in higher service fees or fewer services. In *Maryland v. Louisiana,* the Court refused to allow for more evidence concerning the extent of the discrimination: "We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." 451 U.S. at 760. It follows from this assertion that the fact of discrimination against interstate commerce, rather than its extent, is the primary consideration in determining the constitutionality of state taxes affecting interstate commerce.

It is also unnecessary to consider whether the charitable tax exemption statute, although discriminatory, can be saved by considering the town's interest in the tax and whether nondiscriminatory alternatives are available.

> Although decisions concerning the constitutional validity of state taxes affecting interstate commerce can be assessed in terms of an interest-balancing process similar to that employed in the judicial evaluation of state regulation, the Supreme Court has not

---

[4] According to the Municipal Defendants' computation, if the $20,700.00 tax cost for the year 1991 was allocated to each camper's tuition charge, the cost to each camper would be $36.64. The Municipal Defendants suggest this is minimal in comparison to the $425.00 weekly tuition charges for 1991. *See* Municipal Defendants' Objection to Plaintiff's Motion for Summary Judgment and Memorandum at 12 n.6 and 17, dated May 21, 1993. The court disagrees that $36.64 is minimal, particularly if one considers the aggregate effect of this figure. More importantly, however, that figure confirms the fact of discrimination against interstate commerce.

> usually organized its analysis in terms of such balancing. This is partly a consequence of the fact that the state's ultimate interest is the same in all tax cases—namely, raising revenue.

Laurence H. Tribe, *American Constitutional Law* 441 (2d ed. 1988).[5]

Even if the court did employ the interest-balancing process in this case, the tax exemption statute would not pass muster.[6] The statute directly discriminates against interstate commerce, and, as such, is analyzed under the "per se rule of invalidity" approach. *See Aseptic Packaging Council v. State of Maine*, No. 6780, slip op. at 7 (Me. Feb. 17, 1994). To overcome per se invalidity, the State has the burden

> "to justify [the statute] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." . . . The burden is on the State to show that "the *discrimination* is demonstrably justified by a valid factor unrelated to economic protectionism . . ."

Id. at 7-8 (quoting *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009, 2014-15 (1992)).

---

[5] *See also Bacchus Imports, Itd. v. Dias*, 468 U.S. 263 (Supreme Court did not consider whether the discriminatory tax was justified by legitimate or compelling government interests, or whether reasonable alternatives were available to the taxing scheme); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609; *Maryland v. Louisiana*, 451 U.S. 725; *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977); *American Trucking Ass'n, Inc. v. Quinn*, 437 A.2d 623 (Me. 1981); *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214 (Me. 1986).

[6] Plaintiff suggests that the interest-balancing process is applicable, and that the statute fails under either the "per se rule of invalidity" or the "flexible approach" to the interest-balancing process. The State neither discussed whether the interest-balancing process applied nor responded to plaintiff's argument that the statute fails either approach.

The State argues that the purpose of the charitable tax exemption statute is to foster local benefits. This purpose, however, is not thwarted by extending the tax exemption to institutions which serve out-of-state residents. A nondiscriminatory alternative is available. To the extent that this nondiscrimination alternative is deemed "unavailable" because needed tax revenue would be lost by the extension of the exemption, this argument only emphasizes that the fundamental reason for the denial of a tax exemption is to raise revenue. This fact further confirms Professor Tribe's point that "the state's ultimate interest is the same in all tax cases—namely, raising revenue," and hence the interest-balancing process in state tax cases affecting interstate commerce makes little sense. Tribe, *supra*, at 411.

As the court concludes that the charitable tax exemption statute is unconstitutional under the Commerce Clause, the court need not address the constitutionality of the statute under the Privileges and Immunities Clause.

ORDER

Wherefore, the Order and Entry shall be:

The Municipal Defendants' and the State's motions for summary judgment are DENIED.

Plaintiff's motion for summary judgment is GRANTED. The court declares 36 M.R.S.A. § 652 (1)(A)(1) unconstitutional, enjoins its future enforcement by the Municipal Defendants, and orders reimbursement to plaintiff for the taxes paid as a result of the denial of the charitable tax exemption for the years 1989 to 1991 plus interest.

DATED: March 24, 1994

/s/ Kermit V. Lipez
KERMIT V. LIPEZ
Justice, Superior Court

APPENDIX C

Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)

EXEMPTIONS

§ 652. Property of institutions and organizations

The following property of institutions and organizations is exempt from taxation:

1. Property of institutions and organizations.

A. The real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State, and none of these may be deprived of the right of exemption by reason of the source from which its funds are derived or by reason of limitation in the classes of persons for whose benefit such funds are applied.

(1) Any such institution that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine is entitled to an exemption not to exceed $50,000 of current just value only when the total amount of any stipends or charges that it makes or takes during any tax year, as defined by section 502, for its services, benefits or advantages divided by the total number of persons receiving such services, benefits or advantages during the same tax year does not result in an average rate in excess of $30 per week when said weekly rate is computed by dividing the average yearly charge per person by the total number of weeks in a tax year during which such institution is in fact conducted or operated principally for the benefit of persons who are not residents of Maine. No such institution that is in fact conducted or operated principally for the benefit of

persons who are not residents of Maine and makes charges that result in an average weekly rate per person, as computed under this subparagraph, in excess of $30 may be entitled to tax exemption. This subparagraph does not apply to institutions incorporated as nonprofit corporations for the sole purpose of conducting medical research.

For the purposes of this paragraph, "benevolent and charitable institutions" include, but are not limited to, nonprofit nursing homes and nonprofit boarding homes and boarding care facilities licensed by the Department of Human Services pursuant to Title 22, chapter 1665 or its successor and nonprofit community mental health service facilities licensed by the Commissioner of Mental Health and Mental Retardation, pursuant to Title 34-B, chapter 3. For the purposes of this paragraph, "nonprofit" means a facility exempt from taxation under Section 501(c)(3) of the Code . . . .

APPENDIX D

Maine Legislative Record 2004 (May 21, 1957)

LEGISLATIVE RECORD—HOUSE, MAY 21, 1957

An Act relating to Property Tax Exemption for Benevolent and Charitable Institutions (H. P. 1036) (L. D. 1467)

Was reported by the Committee on Engrossed Bills as truly and strictly engrossed.

The SPEAKER: The Chair recognizes the gentleman from Fryeburg, Mr. LaCasce.

Mr. LACASCE: Mr. Speaker, on item eight, An Act relating to Property Tax Exemption for Benevolent and Charitable Institutions, I don't know how many of you people have read this but it says,—"No such institution shall be entitled to tax exemption if it is in fact conducted or operated principally for the benefit of persons who are not residents of Maine and if stipends or charges for its services, benefits or advantages in excess of $10 per week".

Personally, it seems to me that where we are a vacation state and you are saying here that if it is conducted for the benefit of persons who are not residents of Maine, it is discriminating against the people who come to our state. Personally I can see no good in the bill and move for its indefinite postponement.

The SPEAKER: The Chair understands that the gentleman from Fryeburg, Mr. LaCasce, with respect to item number eight, Bill "An Act relating to Property Tax Exemption for Benevolent and Charitable Institutions, moves that this bill and all accompanying papers be indefinitely postponed.

The Chair recognizes the gentleman from Buxton, Mr. Bruce.

Mr. BRUCE: Mr. Speaker and Members of the House: I would respectfully call the attention of the gentleman from Fryeburg, Mr. LaCasce, to amendment under filing number, I don't recall the number, but it amends the bill to change the $10 to $15. Now this bill has been before the Taxation Committee, it has been approved by both chairmen of the Taxation Committee and either all of the members have approved it, or those who perhaps had misgivings about it, which perhaps could be one or two, have agreed to let it operate for two years and see what happens.

But the gentleman from Fryeburg, Mr. LaCasce, says he sees no reason for the bill. I think that the most important reason for the bill is approximately seven hundred thousand dollars spent all over the State of Maine on taxes to the towns, and I don't think that that is unimportant. I would also want him to know, and the members of the House, that this bill has had a great deal of study by the Taxation Department, it has been approved in essence by a great many of the camps that are operating, to my personal knowledge, and I know there are others who have approved it.

It is a very important bill and I certainly hope that the motion does not prevail after the amount of study and work that has gone into this over the years, not only in this session. It was before the Research Committee in 1953, a great study was made, the problem is a very important one and the bill was written actually by a member of the Supreme Judicial Court of the State of Maine. I am sure that I don't need to debate the question further and I hope that the motion of the gentleman does not prevail.

The SPEAKER: The Chair recognizes the gentleman from Portland, Mr. Maynard.

Mr. MAYNARD: Mr. Speaker, for a matter of information, I would like to know what this bill means. Could someone tell me?

The SPEAKER: The gentleman from Portland, Mr. Maynard, has addressed a question through the Chair to anyone who may answer if he chooses. The Chair recognizes the gentlemen from York, Mr. Hancock.

Mr. HANCOCK: Mr. Speaker, I don't have the bill before me but I can tell you the reasons for the bill. Throughout the State of Maine there are many incorporations of charitable and benevolent institutions. There is in the town of York alone at the present time one such institution that is considered charitable, benevolent, that has been a profit-making organization for quite a few years, and that is the York Harbor Osteopathic Hospital recently incorporated as a non-profit benevolent institution. We have a school in York which is under a little bit different section of our law but relates to the same subject and in the same manner.

In the town of Eliot there is a religious organization. All these organizations are formed and it is not difficult at all to incorporate as a non-profit benevolent institution, or you can call yourself an educational scientific institution, and be tax-exempt by the towns. This particular bill frankly does not help, I don't believe, my particular town, but it does help in some manner over the state. The idea being that those,—there are camps and homes that are incorporated as non-profit organizations that are done so by persons outside the State of Maine who come here, where it is a simple matter to incorporate, set up a summer camp and they call themselves a charitable institution. The only recourse of the towns in such cases is to demand an accounting to see whether or not it is such, profitable or not. And thus far that particular method has been unworkable in a sense. And the decisions of our law court have been most unfavorable with regard to the towns as to what shall be considered charitable and benevolent, to the extent that the particular Eliot case that I mentioned has been to the law court and they found against the town. It means I believe approximately twenty-five hundred dollars in taxes each year to the town of Eliot, that they do not receive.

Mr. Bruce, the gentleman from Buxton, could best explain this particular bill, although it is for those institutions that are set up within the State of Maine by out-of-state people for out-of-state people. That is the main goal of this particular bill. But there is a problem within the State of Maine and I understand the Maine Municipal Association is going to study it with regards to the whole. In other words, with regards to charitable and benevolent and educational and scientific and so forth, to try to divide those who are actually educational and scientific such as are some of our schools, and charitable and benevolent as are many of our hospitals.

But it is not too difficult to set up for some particular sham a tax-free organization in the State of Maine and the towns are stuck by it.

The SPEAKER: The Chair recognizes the gentleman from Portland, Mr. Maynard.

Mr. MAYNARD: Mr. Speaker, then as I understand it, this bill would help the State, help the towns collect taxes which are due them, is that correct?

The SPEAKER: The gentleman from Portland, Mr. Maynard, addresses a second question through the Chair to the gentleman from York, Mr. Hancock, who may answer if he chooses.

Mr. HANCOCK: That is the intent of the bill.

The SPEAKER: Is the House ready for the question? The question before the House is with relation to item number eight, Bill "An Act relating to Property Tax Exemption for Benevolent and Charitable Institutions."

The Chair recognizes the gentleman from Fryeburg, Mr. LaCasce.

Mr. LACASCE: Mr. Speaker and Members of the House: The way this is written, could this apply to schools as it is now?

The SPEAKER: The gentleman from Fryeburg, Mr. LaCasce, addresses a question through the Chair to anyone who wishes to answer. The Chair recognizes the gentleman from Brunswick, Mr. Walsh.

Mr. WALSH: Mr. Speaker and Ladies and Gentlemen of the House: I was one of those members of the Taxation Committee who questioned this measure when it came up. I was perhaps one individual on the Taxation Committee who caused the gentleman from Buxton, Mr. Bruce, as much work and effort as he has put into this thing. I withdrew my objections not with the conviction that this is a perfect answer to replace what we have in the present statutes, but in the firm conviction after having a conference with leaders of all faiths, with people operating many different camps, with the highest court authority we could get in the State of Maine, that this is not going to harm any schools, that it is not going to create any great injustice of any nature on anyone in camps. And while it may not be the perfect answer, it is better than the one we have on the books at the present time, and that is the reason upon the authority and the word of those people that I withdrew my objections. Does that answer your question?

The SPEAKER: Is the House ready for the question? The Chair recognizes the gentleman from Bowdoinham, Mr. Curtis.

Mr. CURTIS: Mr. Speaker, in 1953 we had a question in that legislature, in that session, and also in 1955, that came under Chapter 50. Under Chapter 50 benevolent or charitable institutions were exempted up until 1955 up to five hundred thousand dollars in each locality.

Now there was a group who came into Richmond and Dresden and those bordering towns and bought a lot of property and planned to build a lot of farms and houses and planned to start factories and they came up to the Secretary of State and got a charter saying that they were a charitable institution, and they were White Russians. And then after the cloture rule had gone on, they went to the people of Richmond and the Selectmen and said they were exempt under taxes for the taxes under this Chapter 50. There wasn't anything we could do about it at that time. Although I tried to get an order in here to cut it down to ten per cent of the valuation of the towns, but I was unable to do it, but we did put it into the Legislative Research, and in 1955 that was adopted. Now what I am wondering, are we just doing this thing all over again. And as you can see the town of Richmond only had eleven hundred population and they had bought a great deal of property, and if they were to be exempt, you can see what would happen to a town if someone started out to do this thing. I just wonder what this is. Unless someone can tell me I would like to table it until tomorrow until I can find out more about it, and I so move.

The SPEAKER: The gentleman from Bowdoinham, Mr. Curtis, moves that Bill "An Act relating to Property Tax Exemptions for Benevolent and Charitable Institutions" be tabled and specially assigned for tomorrow pending passage for enactment. Will those who favor the tabling motion please say aye; those opposed, no.

A viva voce vote being taken, the motion did not prevail.

The SPEAKER: The Chair recognizes the gentleman from Gardiner, Mr. Hanson.

Mr. HANSON: Mr. Speaker and Members of the House: I wish to concur with the remarks made by the gentleman from Brunswick, Mr. Walsh. There was oppo-

sition at first in the Taxation Committee and after this amendment which is under filing number 279 was introduced by the gentleman from Buxton, Mr. Bruce, it was with the consent of the Chairman and myself after talking with other members, that we felt that this was a fair bill, possibly would be workable and at the present time there are a great many hardships that are caused on some of the municipalities by the exemption of taxes. I don't believe that this will affect any business that is in the State run by anybody that is in this State. I have talked with—like the gentleman who runs the Y.M.C.A. Camp and other members, and they appear to be in favor of the bill with no opposition.

The SPEAKER: Is the House ready for the question? The question before the House is the motion of the gentleman from Fryeburg, Mr. LaCasce, that Bill "An Act relating to Property Tax Exemptions for Benevolent and Charitable Institutions", House Paper 1036, Legislative Document 1467, and all accompanying papers be indefinitely postponed.

Will those who favor the motion to indefinitely postpone please say aye; those opposed, no.

A viva voce vote being taken, the motion to indefinitely postpone did not prevail.

Thereupon, the Bill was passed to be enacted, signed by the Speaker and sent to the Senate.

(2)

No. 94-1988

In The

Supreme Court of the United States

October Term, 1994

CAMPS NEWFOUND/OWATONNA, INC.,

Petitioner,

v.

TOWN OF HARRISON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WILLIAM L. PLOUFFE
DRUMMOND WOODSUM
& MACMAHON
245 Commercial Street
Portland, ME 04101
Tel: (207) 772-1941

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT

Petitioner challenges the constitutionality of a 38 year old Maine statute which directs municipalities to grant property tax exemptions to certain types of charitable institutions and not to others.[1] The statute, Maine Rev. Stat. Ann. tit. 36, § 652(1)(A)(1) (West Supp. 1994) (hereinafter sometimes referred to as the "exemption statute"), sets up a kind of *quid pro quo*: Relief from property taxes used by municipalities to pay for police, fire protection and other services in return for charitable services to Maine people. Specifically, the exemption statute addresses three categories of Maine non-profits: 1) Those that serve principally Maine residents – they get a full exemption; 2) those that serve principally non-residents but charge only a nominal fee for their services – they receive up to $50,000 in property value exemption; and 3) those that serve principally non-residents and charge more than a nominal fee for their services – they receive no exemption.[2] No claim has been made in this case concerning the fact that the exemption is limited to Maine non-profit corporations.

---

[1] Supreme Court Rule 29.4(c) provides that, in any proceeding before the Court challenging the constitutionality of state law, the initial pleading or paper shall recite that 28 U.S.C. § 2403(b) may apply, and shall be served on the state attorney general. It does not appear that Petitioner has complied with this Rule.

[2] Since the statute uses the term "principally," non-profits can serve many non-residents and still qualify for the full exemption.

The Petitioner, Camps Newfound/Owatonna Inc. ("Camps"), is a Maine non-profit corporation which operates a 180 acre summer camp on the shores of Long Lake in Harrison, Maine.[3] Camps accepts exclusively boys and girls of the Christian Science faith and is the only Christian Science summer camp in New England. Camps offers an array of recreational opportunities – boating, swimming, games – as well as religious instruction. Average enrollment is about 250 campers per summer. During the years 1989 through 1992, approximately 95% of the campers were out-of-state residents. These campers paid fees ranging from $370.00 per week in 1989 to $445.00 per week in 1992 to attend Camps, except to the extent that they received scholarship aid. Camps' annual operating budget is about $640,000.

Camps delivers its services only within Maine. While it may advertise its facility and recruit campers from other states, its product is delivered wholly intra-state. It is of further importance that the exemption statute pertains to real and personal property which has a fixed location in the Town of Harrison and which is taxed at its fair market value. It is not an exemption from a tax placed upon "camper days" or the campers themselves.

Camps pays about $20,000 per year in property taxes. By letter to the Harrison Town Manager dated April 15, 1992, Camps demanded a tax refund for the years 1989 through 1991 and a continuing tax exemption pursuant to

---

[3] Although not part of the record, the following information may be of interest to this Court. The Town of Harrison is located in Cumberland County, about 40 miles northwest of Portland. Its 1990 population was 1,951. *Maine Register* (1994).

the exemption statute. Camps acknowledged in that letter that more than half of their campers are out-of-state residents and further acknowledged that the statute does not allow exemptions for such camps. Nevertheless, Camps claimed entitlement to an exemption because the statute is unconstitutional. The Board of Assessors responded that they were not empowered to decide upon the constitutionality of the statute and they denied the exemption request. (The Respondents stipulated in the course of this litigation that, but for the statutory provision at issue here, Camps would qualify for a full exemption as a charitable institution.)

Camps brought a two count complaint in the Maine Superior Court challenging the denial of the requested exemption. The parties, after written discovery, stipulated to certain facts and agreed that the parties' Cross-Motions for Summary Judgment were in order for hearing. On March 2, 1994, the Superior Court granted summary judgment to Camps on the first count of its Complaint, finding that the exemption statute violates the Commerce Clause. U.S. Const., art. I, § 8, cl. 3. The Superior Court rejected Camps' Equal Protection challenge. U.S. Const. amend. XIV. (The second count of the Complaint had been dismissed earlier. It alleged a violation of 42 U.S.C. § 1983.)

The Town of Harrison appealed the Superior Court decision to the Maine Supreme Judicial Court, sitting as the Law Court (hereinafter "Law Court").[4]

---

[4] Camps refers to the Superior Court as the "Trial Court." There was no trial of facts before the Superior Court. Further,

This was the second time that the Law Court was faced with a constitutional challenge to the exemption statute. In *Green Acre Baha'i Institute v. Town of Eliot*, 159 Me. 395 (1963), the Law Court upheld the same statutory provision, stating:

> We cannot say that it is unreasonable for the State to require the ordinary and normal support of government when a corporation as here principally benefits nonresidents, and to remit taxes when benefits accrue to our own residents. Exemption from tax places an equivalent burden on the remaining taxpayers. Loss in tax revenue from exemption must be balanced by increased assessments on others.
>
> In our view, the denial of exemption to the property of a Maine benevolent and charitable corporation "in fact conducted or operated principally for the benefit of (nonresidents)" is a constitutional exercise of legislative power.

Id. at 399.

The Law Court in the instant case reversed the Superior Court with respect to the Commerce Clause analysis and reaffirmed its holding in *Green Acre* with respect to the Equal Protection Clause. It also held that the exemption statute does not violate the Privileges and Immunities Clause. U.S. Const. art. IV, § 2, cl. 1. (655 A.2d 876 (Me. 1995); Pet. App. A.)

Camps frequently quotes from the Superior Court opinion and compares it to the Law Court opinion. The issue, however, is whether the Law Court's opinion conflicts with opinions of this Court.

Regarding the Commerce Clause, the Law Court determined that the exemption statute "regulates even-handedly with only incidental effects on interstate commerce" and, therefore, that it should be analyzed under the "flexible approach" of *Brown-Forman Distillers v. N.Y. Liquor Authority*, 476 U.S. 573 (1986). Because the exemption statute serves a legitimate state interest and because its burden on interstate commerce does not clearly exceed the local benefits, the Law Court found that the exemption statute meets the *Brown-Forman* test. (Pet. App. 6a.)

ARGUMENT

SUMMARY

Camps asks this Court to exercise its discretionary authority to grant a writ of certiorari because the Maine Law Court's opinion "squarely conflicts with this Court's Decisions." (Pet. 7) *See* Supreme Court Rule 10.1(c). In fact, no opinion of this Court has applied a Commerce Clause analysis to invalidate a state statute like that at issue here and, therefore, there is no direct conflict with applicable decisions of this Court.

The opinions of this Court which come closest to addressing the factual and legal issues presented here, including the constitutionality of statutes that discriminate on the basis of nonresident status, have involved analysis under the Privileges and Immunities Clause and the Fourteenth Amendment. *See, e.g., Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978) (Montana elk hunting license fee differential between residents and non-residents does not violate the Privileges and

Immunities Clause or the Fourteenth Amendment Equal Protection Clause); *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968) (New Jersey statute denying nonprofit corporation real estate tax exemption based on out-of-state incorporation violates Fourteenth Amendment); *Board of Education of Kentucky Methodist Church v. Illinois*, 203 U.S. 553 (1906) (upholding under the Privileges and Immunities and Equal Protection Clauses an Illinois statute requiring charity to be exercised within Illinois in order to qualify for an exemption). However, Camps has not sought review of that portion of the Law Court opinion which upholds the Constitutionality of the statute under the Fourteenth Amendment and the Privileges and Immunities Clause. (Pet. App. 12a) Instead, Camps seeks review only of the Commerce Clause issues, apparently conceding that the exemption statute passes muster under the Fourteenth Amendment and Privileges and Immunities Clause.

Camps cites to numerous "dormant Commerce Clause" cases, especially *Chemical Waste Management v. Hunt*, 112 S.Ct. 2009 (1992), to support its assertion of a conflict between the Law Court's decision and the precedents of this Court. Specifically, Camps cites *Chemical Waste Management* in support of its argument that the Law Court should have applied the "strictest scrutiny" test to the exemption statute instead of the "flexible approach" of *Brown-Forman Distillers, supra*. However, *Chemical Waste Management* and the other opinions cited by Camps are distinguishable on fundamental points and do not control here.

Camps asserts that the Law Court's decision, "if undisturbed," will probably lead to enactment of

numerous state and municipal measures that will deny tax exemptions to nonprofits serving out-of-state residents. (Pet. 6) In fact, Maine's exemption statute was enacted in 1957 and was first upheld by the Law Court in the face of Constitutional challenge in 1963. *Green Acre Baha'i Inst., supra*. This did not lead to a stampede of states and municipalities enacting similar legislation. Further, Camps' argument ignores the fact that states are free to deny property tax exemptions to all nonprofit organizations. If maximization of revenue is the goal of state and local government, as Camps suggests, that could have been accomplished long ago.

The Law Court was correct in applying the "flexible approach" in its Commerce Clause analysis of the exemption statute. However, even if "strictest scrutiny" were applied here, the exemption statute would survive under the application of that analysis by this Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 63 U.S.L.W. 4233 (April 4, 1995).

Camps has failed to make a persuasive argument under the reasons enumerated in Supreme Court Rule 10, or under any other recognized reasons, for granting a writ of certiorari in this case.

1. *Chemical Waste Management* and similar opinions of this Court are not precedent demanding that "strictest scrutiny" be applied.

Camps relies upon *Chemical Waste Management, supra*, as the foundation for its argument that the Law Court's use of the "more flexible" balancing test rather than the

"strictest scrutiny" standard in analyzing the Maine statute was erroneous. (Pet. 7) (A number of other cases are cited in Pet. 7, nt. 15) This reliance is misplaced.

Chemical Waste involved a fee placed by the State of Alabama upon hazardous waste entering the state in the stream of interstate commerce. The clear intent of the fee was to discourage large hazardous waste landfill operators from importing waste from other states. (In fact, only one operator was large enough to be im; acted by the fee.) The effect of the fee upon landfill operators was direct and substantial. If they chose to import the waste, they would pay fees that they would not pay for accepting domestic waste. This Court analyzed the Alabama measure under the strictest scrutiny test and found that it violated the dormant Commerce Clause. This Court observed that, while Alabama proffered a number of valid reasons for discouraging the importation of hazardous waste, it could cite no valid reason to discriminate on health and safety grounds between domestic and imported hazardous waste; both are toxic and potentially harmful to humans and the natural environment. 112 S.Ct. at 2014, 2015.

Camps argues at length that the Maine exemption statute suffers from the same Constitutional infirmities as the Alabama fee on imported hazardous waste. (Pet. 8 - 12) Camps asserts that the Law Court began "its effort to avoid the *Chemical Waste* test with its flat, though unaccountable, rejection of the established equivalence of tax exemptions and taxes." (Pet. 10) The Law Court well understood the differences between real/personal property tax exemptions for charitable organizations and exemptions from excise and sales taxes paid by for-profit

organizations. Indeed, it is the failure of Camps to recognize those differences that have led it to mistakenly argue that the strictest scrutiny test of *Chemical Waste* applies here.

The purpose and effect of tax exemptions for non-profit *vis-a-vis* for-profit organizations is of key importance. The purpose of granting exemptions to charitable organizations, whether it be exemption from property tax or from sales tax, is to allow the organization to devote its financial resources to its charitable goals. The effect is to promote the "good" being done by the charity. This was explicitly recognized by the Law Court in this case:

> The purpose of any tax exemption for charitable institutions is to relieve the charity from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide.

(Pet. App. 6a.) The purpose of granting exemptions to for-profit organizations is to provide them with a subsidy. The effect is to give them a competitive advantage over other organizations who do not qualify for the exemption, *e.g.*, out-of-state producers. It is this form of economic protectionism that violates the Commerce Clause. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). This Court has never found the type of exemption at issue here to violate the Commerce Clause.

Municipal property tax exemptions are also different from excise and sales tax exemptions in how they impact taxpayers. Municipal property taxes are assessed at a rate of tax, usually expressed as dollars of tax per $1,000 of valuation. That rate is set each year based upon the

revenue which must be generated (budget) and the value of all real estate (and some personal property) in the municipality (grand list); budget = rate x grand list. When property is taken off the property list by way of exemption, the remaining taxable property must be taxed at a higher rate in order to meet the budgeted revenue goal. In other words, the non-exempt property taxpayers must "make up for" the dollars lost as a result of the exemption. Here, the non-exempt property owners in the Town of Harrison are called upon to shoulder the burden of taxes that would otherwise be paid by Camps, if it is tax exempt.

By contrast, if a product is exempted from an excise tax or a sales tax (both are a tax on the sale of a commodity), there is no automatic shifting of taxes to other products and their consumers. For example, the liquor excise tax at issue in *Bacchus Imports, Ltd., supra,* is unlike the property tax at issue here. When the Hawaii legislature enacted the exemption for domestic wine sales, it did not automatically thereby increase the rate of tax on all other wines and liquors.

Thus, there is no "established equivalence of tax exemptions and taxes", as Camps asserts (Pet. 8, 9), in the context of real/personal property taxation.[5] Camps' failure to recognize this is an important flaw in its Brief with respect to the applicability of *Chemical Waste.*

---

[5] None of the cases cited by Camps in Pet. 9, nt. 21 involved an exemption from real property taxation.

2. No impact on interstate travel was demonstrated on the record. There is no intent to discourage interstate travel.

Camps argues that the exemption statute somehow discriminates against interstate travel and that this discrimination is a violation of the Commerce Clause. (Pet. 9.) Assumedly, the "travelers" to which Camps refers are their campers who reside outside Maine.

There are no campers before this Court. Further, the record developed before the Superior Court contains no evidence that the exemption statute impeded interstate travel to Camps or that Camps provides services that are necessary for interstate travel. (Pet. App. 7a).

To meet the challenge of finding articles of commerce in this fact pattern which would invoke the Commerce Clause, Camps cites *Heart of Atlanta Hotel, Inc. v. United States,* 379 U.S. 241 (1964) as support for the proposition that the boys and girls who travel to Maine to attend Camps are "unmistakably a part of interstate commerce." (Pet. 9, nt. 23). *Heart of Atlanta,* however, was a civil rights case examining the jurisdiction of Congress to enact the public accommodations law under its Commerce Clause authority. There, this Court found "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." 379 U.S. at 253 (Travelers must have places to eat and sleep.)

Finding that the Commerce Clause provides a jurisdictional basis for Congress to enact public accommodations legislation is a wholly different analysis from

determining whether the dormant Commerce Clause prohibits a state from enacting a local property tax exemption. Respondents assume, *arguendo*, that Congress can, if it chooses, regulate virtually any area of American life based upon the courts' expansive reading of the Commerce Clause. *Cf. United States v. Lopez*, 63 U.S.L.W. 4343 (April 26, 1995). But, if that same expansive reading is applicable to the dormant Commerce Clause, intra-state commerce would almost cease to exist. The mere fact that persons cross state lines to purchase a good or a service does not automatically subject state action which affects the price paid for the good or service to dormant Commerce Clause scrutiny. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253 (1938) (taxation of a local business, which is separate and distinct from the transportation and intercourse which is interstate commerce, is not forbidden merely because the local business induces the transportation or intercourse).

Camps attempts in its Brief before this Court – as it did before the Maine courts – to use selected excerpts from the 1957 Maine House of Representatives floor debates on the exemption statute to show an illicit purpose behind enactment of the statute. (Pet. 6, 10.)

Camps' use of the legislative debates is contrary to generally accepted principles of statutory construction:

> References to motives of members of the legislature in enacting a law are uniformly disregarded for interpretive purposes except as expressed in the statute itself. The reasons which prompted various members to enact the law may be varied, conflicting and difficult to determine, and

> they may be unrelated to any consideration about the meaning of the statute.

2A Normand J. Singer, *Sutherland Stat. Const.* § 48.17 (4th Ed. 1984).

The United States District Court, District of Maine, has expressly rejected the notion that courts should examine legislative debates to discern illegal motives except in very limited circumstances which do not concern economic regulation or tax policy. In *International Paper Company v. Inhabitants of the Town of Jay*, 736 F.Supp. 359 (Dist. Me. 1990), Judge Carter refused to examine the alleged illicit motives of the town selectmen in drafting and proposing an ordinance to impose local environmental controls on industries. He wrote:

> Plaintiff argues . . . that the Court must strike down the Ordinance because of the illicit motives of the selectmen in commissioning the drafting of the Ordinance and proposing it. The Court holds that proper review of the Ordinance entails that the Court focus on the Ordinance itself. [*United States v. O'Brien*, 391 U.S. 367, 383 (1968); *Fraternal Order of Police Hobart Lodge No. 121 v. City of Hobart*, 865 F.2d 551 (7th Cir. 1988).] The Supreme Court in *O'Brien* noted that courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." [*O'Brien*, 391 U.S. at 383.] The Court limits the potential scope of analysis out of respect for the democratic political process and because of the inherent difficulty of determining the motives of a collective body. *Fraternal Order of Police Hobart Lodge No. 121*, 864 F.2d at 554.

Id. at 364. The District Court goes on to acknowledge that in certain limited situations courts have looked to legislators' motives but notes that these "forays" have been confined to laws that infringe upon fundamental rights or that discriminate on invidious grounds. The exemption statute does neither.

This Court should disregard Camps' discussion of the floor debates. *See Conroy v. Aniskoff*, 113 S.Ct. 1562, 1567 (1993) (Scalia, J., concurring).

In any event, the Respondents contend that the floor debates reveal no impermissible discriminatory motive on the part of legislators. The motive was to protect local taxpayers from bearing unfair tax burdens.

3. Even if the strictest scrutiny test is applied, the exemption statute passes muster.

Camps argues that the Law Court should have applied the "strictest scrutiny" test and, in particular, should have employed the four part test first laid down by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).[6] The Respondents answer that, even if the exemption statute is analyzed under the *Complete Auto* test, the exemption statute passes muster.

As noted by the Law Court (Pet. App. 6a) and as explained above, Camps delivers its services only within

---

[6] Camps actually discusses the use of the test in *Chemical Waste Management, supra.* (Pet. 7) However, Camps also states that "the trial court was incontestably correct both in its election of governing standard and in its application of that standard." *Id.* The trial court's standard was *Complete Auto.*

Maine. Further, the exemption statute pertains to real and personal property which has a fixed location in the Town of Harrison and which is taxed at its fair market value. It is not an exemption from a tax placed upon "camper days" or the campers themselves.

This Court recently reviewed an Oklahoma statute which placed a tax on bus tickets sold in Oklahoma for interstate travel. *Oklahoma Tax Commission v. Jefferson Lines, Inc., supra.* Applying the four part *Complete Auto* test, this Court upheld the statute.

Applying the same *Complete Auto* test, the Maine Superior Court in the instant case struck down the exemption statute because it failed the third part of the test, *i.e.*, that it not discriminate against interstate commerce. (Pet. App. 13a) However, when one applies the *Complete Auto* test, as interpreted in *Jefferson Lines*, one finds that the exemption statute in fact passes all four parts of the test.

The first part of the test, that the state tax have a substantial nexus to the taxing state, is clearly met. (Even though the exemption statute is an exemption from a local tax, the tax policy is set by the State of Maine.) The exemption relates to real and personal property within the state.

The second part of the test, that the tax be fairly apportioned, is also met. The exemption statute is both "internally consistent" and "externally consistent" because it pertains to a fixed item, real estate/personal property, that will never be taxed by another state. (The Maine Superior Court had no problem finding that the

exemption statute meets the second part of the test. (Pet. App. 13a))

The third part of the test, that the tax not discriminate against interstate commerce, was the source of the Superior Court's problem with the statute. (Pet. App. 13a) The Superior Court reasoned that the exemption statute makes it more expensive to operate camps which serve primarily out-of-state residents and that this places such camps at an economic disadvantage. Thus, it reasoned, it impermissibly discriminates against interstate commerce. This is similar to the argument advanced by the respondent in *Jefferson Lines*. Respondent there argued that the Oklahoma tax discriminated against out-of-state travel by taxing a ticket at the full 4% regardless of whether the ticket related to a route entirely within Oklahoma or to travel only 10% within Oklahoma. 63 U.S.L.W at 4240. This Court rejected that argument. In doing so, it observed:

> As with a tax on the sale of tangible goods, the potential for interstate movement after the sale has no bearing on the reason for the sales tax. (citations omitted) Only Oklahoma can tax a sale of transportation to begin in that State, and it imposes the same duty on equally valued purchases regardless of whether the purchase prompts interstate or only intra-state movement. There is no discrimination against interstate commerce.

Id.

With the exemption statute, the "tax" on real estate/personal property does not turn on whether there is a potential for, or there in fact is, interstate movement of

campers or other beneficiaries of the non-profit's service. It turns upon the residence of the beneficiaries. To illustrate, a Maine non-profit could operate from facilities in Maine, *e.g.*, a headquarters building, but deliver its charity primarily outside Maine. Although there is no impeded interstate travel, the Maine non-profit would fail to qualify for the exemption.

In the instant case, Camps chooses to operate in a manner that promotes interstate travel. But it is not that travel which is the "trigger" for the exemption statute. Thus, as with the bus ticket tax in *Jefferson Lines*, the potential for interstate travel by its customers has no bearing on the reason for the exemption. As the Law Court observed:

> If there is any impact on interstate commerce it is incidental; it is not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine.

(Pet. App. 6a)[7] Thus, the third prong of the *Complete Auto* test is met here.

The fourth part of the test, that there be a fair relation between the tax and the benefits conferred upon the taxpayer, is met here. The municipal services provided in return for local property taxes are more than just a benefit, they are necessities. It is beyond question that there is a fair relation between the taxes and the benefits.

---

[7] This is in direct contrast to the fee in *Chemical Waste* which had the purpose and effect of keeping hazardous waste from entering Alabama.

Thus, the exemption statute would survive even if analyzed under the *Complete Auto* test.

CONCLUSION

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinion of the Law Court, the Petition should be denied.

Respectfully submitted,

WILLIAM L. PLOUFFE
DRUMMOND WOODSUM
& MACMAHON
245 Commercial Street
Portland, ME 04101
Tel: (207) 772-1941

Counsel for Respondents

(3)

No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,
v.
TOWN OF HARRISON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Maine Supreme Judicial Court

---

PETITIONER'S REPLY MEMORANDUM

WILLIAM H. DEMPSEY *
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
* Counsel of Record

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD
GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

July 13, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1988

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Maine Supreme Judicial Court

---

PETITIONER'S REPLY MEMORANDUM

In opposing the grant of *certiorari*, respondents advance arguments, several of them new, that not only are meritless but that are also revealing, for they foretell the use to which the decision below can be put if left standing: the broad exposure of non-profit organizations serving out-of-state residents to tax discrimination by states and localities.[1]

1. Respondents agree that the decision of the Law Court turned upon the difference it perceived between non-profit and for-profit organizations:

> "The purpose and effect of tax exemptions for non-profit *vis-a-vis* for-profit organizations is of key importance. The purpose of granting exemptions to charitable organizations . . . is to allow the organiza-

---

[1] Though served with the Petition for Certiorari upon its filing, the state has not sought to intervene, just as it did not appeal the judgment of the Superior Court to the Law Court.

> tion to devote its financial resources to its charitable goals. The effect is to promote the 'good' being done by the charity. This was explicitly recognized by the Law Court in this case . . . ." Opp. p. 9.

It is on this basis, respondents maintain, that the "strictest scrutiny" rule of the line of cases summarized in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), was properly set aside by the Law Court. The argument, we take it, is that, assuming the statute facially discriminates against interstate commerce, it is nonetheless saved from "strictest scrutiny"—and ultimately saved under any test—by its high purpose.

It is quite true, as respondents aver and as we noted in our Petition (p. 13), that no dormant Commerce Clause decision of this Court has involved non-profit organizations. But neither is there basis in any of the opinions in those cases, in any opinion of any other court so far as we know, or in reason, for conferring Commerce Clause blessing upon tax discriminations designed to promote the recreation of residents while condemning like discriminations designed to promote their economic welfare. If such a radical departure from precedent is not so plainly wrong as to merit summary reversal, as we submit it is, at the least it should not be passed by without plenary review.[2]

2. Next, while respondents acknowledge that "Camps chooses to operate in a manner that promotes interstate travel" (Opp. p. 17), they nevertheless insist that "[n]o

[2] In a related argument, respondents assert, again without support in precedent or policy, that the fact that the exemption at issue relates to a property tax rather than to an excise or sales tax should also preclude application of the *Chemical Waste* test. The reason assigned is that "[w]hen property is taken off the property list by way of exemption, the remaining taxable property must be taxed at a higher rate in order to meet the budgeted revenue goal." Opp. pp. 9-10. We do not suppose respondents mean to suggest that the revenue lost by way of exemptions from excise or sales taxes somehow need not be made up. But we do not discern what else respondents' point might be.

impact on interstate travel was demonstrated on the record" (Opp. p. 11).

But respondents do not deny that the statute's impact is self-evident in terms of increasing the costs, diminishing the services, or inducing the restriction of out-of-state enrollment of organizations serving non-residents, whether the organizations be camps, nursing homes, boarding care facilities, or any other type of "benevolent and charitable institution." Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1). (As to petitioner, as we have noted, the actual dollar impact—about $20,000 a year—is established in the record. Pet. p. 3.)

As this Court's decisions cited in our Petition—and not discussed by respondents—show, this is quite enough, at least where the discrimination is palpable. See Pet. pp. 4, 11 & n.27. See also *New Energy Co.* v. *Limbach*, 486 U.S. 269, 276 (1988) ("Our cases . . . indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 269 (1984) (Both "the small volume of sales of exempted liquor" and "the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors" "go only to the extent of such competition." But "[i]t is well settled that '[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' *Maryland* v. *Louisiana*, 451 U.S. 725, 760 (1981).").

3. Respondents devote the balance of their discussion of the impact on interstate commerce question to an analysis of *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), that quite misses the point. Opp. pp. 11-12. It is of course true that neither that decision nor any other stands for the proposition that a subject that is within the power of Congress under the Commerce Clause is by that token beyond the power of the States.

Opp. pp. 11-12. *Heart of Atlanta Motel* is relevant here because it confirmed that, as respondents do not dispute, interstate travel is an ingredient of commerce within the Commerce Clause. While the issue there was the power of Congress and not that of the States, it is established, as we have noted, that "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation," *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979). This simply means, not that the states are powerless to take action that affects interstate travel, but that they may not take action that affects it in a discriminatory fashion.

4. Respondent's last argument is that "[e]ven if the strictest scrutiny test is applied, the exemption statute passes muster." Opp. p. 14. The "strictest scrutiny" test governs, under the *Chemical Waste Management, Inc.* line of decisions, where the statute "facially discriminates" against interstate commerce. 504 U.S. 342-44; Pet. p. 8.[3] In arguing that the Maine statute survives even "strictest scrutiny," respondent relies upon a recent decision of this Court in which that test was *not* applied because, as Mr. Justice Scalia explicitly noted as the basis for his concurrence, the Court concluded that "Oklahoma's sales tax does not facially discriminate against interstate com-

[3] Respondents unaccountably assert that we argue "the Law Court . . . should have employed the four part test first laid down by this Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977)." Opp. p. 14. We did not even *cite Complete Auto*, which did not involve a statute discriminatory on its face, in which the Court did not refer to a strict scrutiny or comparable test, and in which the statute was upheld. Nor did the Law Court. While the Superior Court did look to the discrimination element of the *Complete Auto* analysis, its application of the "per se rule of invalidity" was based upon *Chemical Waste Management* and like authorities. See Pet. App. B pp. 16a-19a. For an accurate statement of our position, see the footnote respondents append to this erroneous text: "Camps actually discusses the use of the test in *Chemical Waste Management, supra*. . . ." Opp. p. 14 n.6.

merce." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1346 (1995). This decision, thus, can be added to a host of other dormant Commerce Clause cases that are not pertinent here. A ruling that a sales tax that applies equally to all bus ticket purchases, whether for solely intrastate or partly interstate travel, does not facially discriminate teaches nothing with respect to a tax exemption that is denied only to organizations that serve primarily non-residents.

In seeking to justify the statute under the "strictest scrutiny test," respondents also advance an argument that could perhaps better be viewed as a contention that the test doesn't apply at all because the provision does not facially discriminate. Thus, respondents assert that the application of the statute "does not turn on whether there is a potential for, or there in fact is, interstate movement of campers," but rather "upon the residence of the beneficiaries." Opp. pp. 16-17. To show that the statute could conceivably apply in the absence of interstate travel, respondents postulate a hypothetical nonprofit with headquarters in, but operations outside, the State.

But the statute was upheld as applied to petitioner, and respondents of course do not suggest that petitioner's nonresident campers do not come from other states. The argument is meritless in any event. It doubtless never occurred to the legislature to so truncate the provision that it would apply only where the services are performed outside the state, since that would have quite defeated the legislative purpose, whether that purpose be what appears to be the real one—raising revenue—or the conjectural one—benefitting only organizations serving residents.

Where a tax burden will, both in fact and in legislative contemplation, fall only upon interstate commerce in all but the most fanciful instances, there is facial discrimination in all but the most strained sense. In any case, whatever the formulation, there is the sort of discrimination

that is impermissible, at least absent a powerful justification. "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects. See *Hughes* v. *Oklahoma*, 441 U.S., at 336; *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980). For decisions in which statutes discriminating against interstate commerce were struck down though their impact, in fact and not just in theory, was not confined to such commerce, see, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 361 (1992), and *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 & n.4 (1951).

5. Finally, while evidently agreeing that the decision in this case sanctions, for the first time so far as the parties or the lower courts have been able to discover, differential state taxation of non-profit organizations serving non-residents, respondents maintain that the decision will have little practical effect. They observe, first, that there has not been "a stampede of states and municipalities enacting similar legislation" since the 1963 decision initially upholding this statute, *Green Acre Baha'i Institute* v. *Town of Eliot*, 159 Me. 395, 193 A.2d 564 (1963). Opp. p. 7. Next, they assert the relevance of the truism that "states are free to deny property tax exemptions to all nonprofit organizations." *Id.*

But *Green Acre* did not sustain the statute against the most obvious objection, the Commerce Clause; a denial of *certiorari* would give greatly increased currency to the Law Court's decision; the drive to curtail tax exemptions is recent and gaining force (see Pet. pp. 12-13); and, given freedom to do so, state and local taxing authorities are much more likely to balance fiscal and political needs by catering to local interests and imposing burdens on "foreign" interests than to engage in across-the-board repeal of long-established exemptions. It is precisely the

purpose of the Commerce Clause to brake that predictable, parochial bent of local political systems.

Respectfully submitted,

WILLIAM H. DEMPSEY *
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
* Counsel of Record

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD
GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

July 13, 1995

(4)

No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

vs.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

JOINT APPENDIX

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, DC 20036
(202) 828-2000

WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271
Counsel for Petitioner

WILLIAM L. PLOUFFE *
DRUMMOND WOODSUM & MACMAHON
245 Commercial Street
Portland, Maine 04101
(207) 772-1941
Counsel for Respondents

* Counsel of Record

PETITION FOR WRIT OF CERTIORARI FILED JUNE 2, 1995
CERTIORARI GRANTED MARCH 4, 1996

64 pp

INDEX

The following opinions, decisions, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

SUPERIOR COURT
STATE OF MAINE
CUMBERLAND COUNTY

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND OWATONNA, INC.,
a Maine Non-Profit Corporation,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, SUSAN SEARLES, MICHAEL DARCY, PAUL KILGORE, ALBERT HAGGERTY and ROBERT BAKER, as the Harrison Municipal Officers and Assessors, and MICHAEL THORNE as the Harrison Tax Collector,
Defendants

DOCKET ENTRIES

DATE	PROCEEDINGS
1992	
June 04	Received 06-03-92
	Complaint for Declaratory & Injunctive Relief and for Damages filed.
June 24	Received 6/24/92.
	Acceptance of Service filed by William Plouffe, Esq. for defendant Inhabitants of the Town of Harrison on 6/22/92.
July 10	Received 07-10-92.
	Defendants, Inhabitants of the Town of Harrison, Susan Searles, Michael Darcy, Paul Kilgore, Albert Haggerty, Robert Baker and Michael Thorne's Answer filed.

DATE	PROCEEDINGS
1992	
July 16	Received 07-16-92.
	Exhibits A & B to be attached to Plaintiffs' Complaint filed.
	Acceptance of Service filed.
	Thomas D. Warren, Deputy A.G. Accepted Service for Party-in-interest, Attorney General of the State of Maine.
July 29	Received 07-29-92.
	Plaintiff's Case File Notice and Pretrial Scheduling Statement and Jury Demand Rule 38(b), M.R. CIV.P. filed.
Aug. 5	Received 08-05-92:
	Letter from Robert Alan Wake, AAG, entering his appearance as Intervenor on behalf of the Defendants, filed.
	Attorney General's Notice of Intervention filed.
Aug. 18	Received 08-18-92:
	Plaintiff's Notification of Discovery Service filed.
	Interrogatories Propounded to Defendants and Request for Admissions, served on William Plouffe, Esq. on 8-17-92.
Sept. 18	Received 09-18-92:
	Defendants' Notification of Discovery Service filed.
	Defendants' Response to Plaintiff's Request for Admissions served on William Dale, Esq. on 8-17-92.
Sept. 21	Received 9/21/92.
	Defendant's Notification of Discovery Service filed.
	Defendants' Answers to Interrogatories Propounded by Plaintiff served on William H. Dale, Esq. on 9/18/92.

DATE	PROCEEDINGS
1992	
Oct. 13	Received 10-13-92.
	Defendants' Motion for Judgment on the Pleadings with Attachments A-C filed.
	Defendants' Request for Hearing on Motion filed.
Oct. 15	Received 10-9-92.
	Expedited Pretrial Order filed. (Fritzsche, J.)
	"Expedited Pretrial Order filed. Discovery to be closed by 1/31/93 Case ordered placed on the non-jury trial list 30 days after close of discovery. By order of the presiding justice the Expedited Pretrial Order is incorporated by reference in the docket." 10-14-92—Copies to William Dale, William Plouffe and Robert Allan Wake, Esqs.
Oct. 23	Received 10-23-92.
	Defendants' Notification of Discovery Service filed. Defendants' Supplemental Answers to Plaintiff's Interrogatories served on William H. Dale, Esq. on 10-22-92.
Nov. 2	Received 11-2-92.
	Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Judgment on the Pleadings.
Nov. 13	Received 11/12/92.
	Defendant's Reply Memorandum to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Judgment on the Pleadings filed.
Nov. 13	Received 11-13-92.
	State's Motion for Enlargement of Time to File Reply Memorandum filed.
Nov. 20	Received 11-20-92.
	State's Reply Memorandum of Law in Support of Town's Motion for Judgment on the Pleadings filed.

DATE	PROCEEDINGS
1992	
Dec. 30	On 12-29-92:
	Hearing Held on Defendant's Motion for Judgment on the Pleadings. Court Takes Matter Under Advisement.
	Perkins, J. Presiding.
	Tape No. 570
Dec. 31	Received 12-31-92.
	Defendant's Notification of Discovery Service filed. Interrogatories Propounded to Plaintiff and Request for Product of Documents served on William H. Hale, Esq. on 12-30-92.
1993	
Jan. 04	Received 01-04-93.
	Plaintiff's Notification of Discovery Service filed. Second Set of Requests for Admissions Served on William L. Plouffe, Esq. on 12-31-92.
Jan. 11	Received 01-11-93.
	Plaintiff's Notification of Discovery Service filed. Plaintiff's Request to Intervenor for Admissions Served on Robert Alan Wake, Esq. on 01-07-93.
Feb. 01	Received 02-01-93.
	Defendants' Notification of Discovery Service filed. Defendants' Objection to Plaintiff's Second Request for Admissions and Alternatively, Defendants' Response Thereto Served on William H. Dale, Esq. on 01-29-93.
Feb. 11	Received 02-11-93.
	Intervenor's Notification of Discovery Service filed. Response to Plaintiff's Request for Admissions Served on William H. Dale, Esq. on 02-09-93.

DATE	PROCEEDINGS
1993	
Feb. 24	Received 02/24/93:
	Plaintiff's Notification of Discovery Service filed.
	Plaintiff's Answers to Municipal Defendants' Interrogatories served on William L. Plouffe, Esq. on February 23, 1993.
	Plaintiff's Motion to Amend Complaint filed.
	First Amended Complaint for Declaratory and Injunctive Relief, and for Damages filed.
	Plaintiff's Request for Hearing on Motion to Amend Complaint filed.
March 4	Received 03-04-93:
	Order filed. (Lipez, J.)
	ORDERED that Plaintiff's motion dated February 23, 1993 to Amend Complaint is granted without objection.
	On 03-04-93: Copies mailed to Robert Alan Wake, William Plouffe, and William Dale, Esqs.
Mar. 9	Received 3-9-9
	Order on Failure to File Report of Conference of Counsel filed. (Lipez, J.)
	It is therefore ORDERED that, unless the Report of Conference of Counsel is filed within ten (10) days hereof, this case will be dismissed with prejudice.
	3-9-93 copy mailed to: William Dale, William Plouffe and Robert Wake, Esqs.
Mar. 18	Received 03-18-93:
	Plaintiff's Motion to Extend Time to File Report of Conference of Counsel filed.
	Affidavit of William H. Dale with Attachment filed.

DATE	PROCEEDINGS
1993	
March 19	Received 03-18-93:
	Order filed. (Fritzsche, J.)
	ORDERED, that the date for filing the Report of Conference of Counsel be and hereby is extended to March 24, 1993.
	On 03-19-93: Copies mailed to Robert Alan Wake, William Plouffe and William Dale, Esqs.
Mar. 24	Received 03-24-93:
	Joint Report of "Conference of Counsel with Attachments filed.
Apr. 9	Received 4-9-93.
	Report of Conference of Counsel filed.
Apr. 12	Received 04-09-93:
	Plaintiff's Motion for Summary Judgment filed.
	Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment with Exhibits 1, 2 & 3 filed.
	Plaintiff's Summary Judgment Factual Record filed.
	Plaintiff's Request for Hearing on Motion filed.
Apr. 21	Received 04-21-93:
	Defendants' Objection to and Motion to Stay Plaintiff's Motion for Summary Judgment and Incorporated Memorandum filed.
Apr. 23	Received 04-23-93.
	Defendant's Request for Hearing on Objection to and Motion to Stay Plaintiff's Motion for Summary Judgment and Incorporated Memorandum of Law filed.

DATE	PROCEEDINGS
1993	
Apr. 27	Received 04-27-93:
	Letter from William L. Plouffe, Esq. asking for expedited hearing on his Motion to Dismiss the Motion for Summary Judgment and his Motion to Stay filed.
April 28	Received 04-28-93:
	Decision and Order filed. (Perkins, J.)
	The Order and Entry Shall Be: Defendants' Motion to Dismiss is Granted only as to Count II and otherwise Denied.
	On 04-28-93: Copies mailed to Robert Alan Wake, William Plouffe, and William Dale, Esqs.
	Defendants' Motion for Expedited Hearing and Incorporated Memorandum filed.
May 04	Received 05-04-93:
	Intervenor State of Maine's Memorandum in Response to Municipal Defendants' Motion for Stay filed.
May 06	Received 05-06-93:
	Copy of Letter from William L. Plouffe, Esq. to William H. Dale, Esq. asking that all parties sign Joint Motion to Resolve Certain Outstanding Issues and then file with court filed.
May 10	Received 05-07-93:
	Plaintiff's Motion to Alter, Amend or Reconsider filed.
	Plaintiff's Memorandum of Law in Support of its Motion to Alter, Amend or Reconsider filed.
	Plaintiff's Request for Hearing on Motion filed.
May 13	Received 05-13-93:
	Joint Motion to Resolve Certain Outstanding Issues and to Schedule Proceedings filed.

DATE	PROCEEDINGS
1993	
May 13	Received 05-13-93:
	Order filed. (Cole, J.)
	It is hereby ORDERED: 1. Pursuant to M.R.Civ. P. 16(c) (2), the court grants leave to the parties to file their Motions for Summary Judgment after the discovery deadline of January 31, 1993. 2. Defendants have until May 21, 1993 to respond to Plaintiff's Motion for Summary Judgment dated April 9, 1993. 3. Defendants shall have until June 1, 1993 to file their Motion for Summary Judgment. Pursuant to rule 79(a) of the Maine Rules of Civil Procedure, the Clerk is directed to enter this order on te civil docket by notation incorporating it by reference. ON 05-14-93: Copies mailed to Robert Alan Wake, William Plouffe and William Dale, Esqs.
May 24	Received 05-21-93:
	Municipal Defendants' Objection to Plaintiff's Motion for Summary Judgment and Memorandum filed.
May 25	Received 05-25-93.
	Municipal Defendants' Objection to Plaintiff's Motion to Alter, Amend or Reconsider and Memorandum filed.
	Intervenor, State of Maine's Cross-Motion for Summary Judgment filed.
	Intervenor, State of Maine's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of State's Cross-Motion filed.
	Intervenor, State of Maine's Statement of Material Facts in Support of Cross-Motion for Summary Judgment filed.

DATE	PROCEEDINGS
1993	
	Intervenor, State of Maine's Response to Plaintiff's Statement of Material Facts filed.
	Intervenor, State of Maine's Request for Hearing on Cross-Motion for Summary Judgment filed.
	Intervenor, State of Maine's Memorandum in Opposition to Plaintiff's Motion for Reconsideration filed.
	Intervenor, State of Maine's Motion for Enlargement of Time filed.
May 26	On 05-25-93:
	As to The State's Motion for Enlargement of Time: Motion Granted. (Brennan, J.)
	On 05-26-93: Copies mailed to Robert Alan Wake, William Plouffe and William Dale, Esqs.
May 28	Received 5-28-93.
	Municipal Defendants' Motion for Summary Judgment Pursuant to M.R.Civ.P 56 filed.
	Municipal Defendants' Memorandum in Support of Their Motion for Summary Judgment filed.
	Municipal Defendants' Request for Hearing on Motion for Summary Judgment filed.
June 02	Received 06-01-93:
	Plaintiff's Reply Memorandum to Defendants' Opposition to Plaintiff's Motion for Summary Judgment filed.
June 07	Received 06-07-93.
	State's Reply Memorandum in Support of Cross-Motion for Summary Judgment filed.
June 15	Received 06-15-93:
	Plaintiff's Memorandum in Opposition to Defendants' Cross-Motion for Summary Judgment filed.

DATE	PROCEEDINGS
1993	
June 24	Received 06-24-93:
	Municipal Defendants' Reply to Plaintiffs' Opposition to Defendants' Cross-Motion for Summary Judgment filed.
Aug 12	Received 08-11-93:
	Letter from William H. Dale confirming Motion for Summary Judgment scheduled on Sept 9, 1993 filed.
Aug. 31	Received 08-31-93:
	Letter from William Dale, Esq. asking that cross motions for summary judgment be heard on 09-09-93 filed.
Sept. 9	Received 9/7/93.
	Letter filed by William Dale, Esq. regarding Plaintiff's Pending Motion.
Sept. 17	On 9/9/93:
	Hearing held on Plaintiff's Motion for Summary Judgment and Defendant's Motion for Summary Judgment.
	Court takes matter under advisement.
	Lipez J. Presiding. Tape 734, Index 407 thru 1643.
Oct. 07	Received 10-05-93:
	Letter from William Dale, Esq. asking when hearing is scheduled for pending motions filed.
1994	
Jan. 03	Received 12-30-93:
	Letter from William Dale, Esq. regarding pending motions filed.
Jan. 10	Received 01-07-94:
	Letter from William Plouffe, Esq. regarding pending motions filed.

DATE	PROCEEDINGS
1994	
March 3	Received 3/2/94.
	Decision and Order filed. (Lipez, J.) "JUDGMENT"
	Wherefore, the Order and Entry shall be: The Municipal Defendants' and the State's motions for summary judgment are DENIED. Plaintiff's motion for summary judgment is GRANTED. The court declares 36 M.R.S.A. § 6521 (1) (A) (1) unconstitutional, enjoins its future enforcement by the Municipal Defendants, and orders reimbursement to plaintiff for the taxes paid as a result of the denial of the charitable tax exemption for the years 1989 to 1991 plus interest. 3/3/94—Copies to William Dale, William Plouffe, Robert Alan Wake, Esqs.
Mar. 07	Received 03-07-94:
	Letter from William H. Dale, Esq. regarding Plaintiff's motion for reconsideration of relief filed.
March 16	Received 3/16/94.
	Letter filed by William L. Plouffe, Esq. regarding Motion for Reconsideration.
March 23	Received 3/22/94.
	Defendant's Notice of Appeal to The Law Court from the Judgment dated March 2, 1994 filed.
	3/23/94—Copies to William Dale, William Plouffe and Robert Alan Wake Esqs.
	On 3/22/94:
	Defendant's Appeal Fee of $100.00 pad.
	On 3/23/94:
	Attested copies of the Docket Entries and Notice of Appeal given to the Clerk of the Law Court on this date.

DATE	PROCEEDINGS
1994	
Apr. 06	Received 04-04-94:
	Letter from Robert Alan Wake stating the Deputy Attorney General Crombie Garrett replaced him as counsel for the State filed.
Apr. 7	Received 4-6-94.
	Defendants/Appellant's Certificate of Transcript and Issues on Appeal Pursuant to M.R.Civ.P. 74 filed.
April 8	Received 4/6/94
	Copy of letter from James C. Chute, Clerk of the Law Court, regarding the complete file must be transmitted by April 12, 1994 filed.
Apr. 22	On 4-21-94:
	Hearing held on Plaintiff Camps Newfound/Owatonna, Inc.'s Motion for Reconsideration.
	Court Takes under Advisement. (Perkins, J.) Perkins, J. Presiding.
	Arlene Edes, Court Reporter
May 4	On 4/29/94:
	As to Plaintiff's Motion to Alter, Amend Or Reconsider—Motion to alter, amend or reconsider denied. (Perkins, J.)
	5/4/94—Copies to William Dale, William Plouffe and Robert Alan Wake, Esqs.
May 4	On 5/4/94:
	Complete file with exhibits transmitted to the Clerk of the Law Court on this date.
	"LAW"
	On 5/4/94:
	Copies on the Index, Exhibit Transmission Sheet and Docket Entries Mailed to Attorneys.

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT

Civil Action Docket No. CV-

CAMPS NEWFOUND/OWATONNA, INC.,
a Maine Non-Profit Corporation,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, SUSAN SEARLES, MICHAEL DARCY, PAUL KILGORE, ALBERT HAGGERTY and ROBERT BAKER, as the Harrison Municipal Officers and Assessors, and MICHAEL THORNE as the Harrison Tax Collector
Defendants

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND FOR DAMAGES

Plaintiff sues Defendants and each of them and alleges:

CAUSE OF ACTION AND JURISDICTION

1. This action is commenced pursuant to the Maine Declaratory Judgments Act, 14 M.R.S.A. §§ 5951-63, and pursuant to the provisions of 42 U.S.C. § 1983 to secure the rights of Plaintiff under Article I, section 8, cl. 3 (the Commerce Clause); under Aritcle IV, section 2, cl. 1 (the Privileges and Immunities Clause); and under the 14th Amendment to the Constitution of the United States, including its privileges and immunities clause, equal protection clause, and due process clause; and under Article I, section 6-A of the Constitution of the State of Maine. This court has jurisdiction under 14 M.R.S.A. §§ 5951-63.

2. This is a suit for declaratory and injunctive and other affirmative relief to alleviate discrimination in the law of the State of Maine which unlawfully burdens interstate commerce and which illegally and unconstitutionally discriminates against Maine non-profit corporations that have out-of-state interests. Plaintiff is seeking, among other relief, a declaration that 36 M.R.S.A. § 652(1)(A)(1) is unconstitutional on its face and as applied under the aforementioned provisions of the United States Constitution and the Maine Constitution; and injunction against further enforcement of the statute; and reimbursement of taxes and interest illegally assessed and collected pursuant to that statute.

PARTIES

3. Plaintiff Camps Newfound/Owatonna, Inc. is a benevolent and charitable institution for purposes of 36 M.R.S.A. § 652(1)(A) and is organized under Title 13-B of the laws of the State of Maine as a non-profit corporation. Plaintiff owns real property in and its main office is located in Harrison, Maine; the property is used and occupied solely by Plainitff for its benevolent and charitable purposes. Although Plaintiff is open to and welcomes persons who meet its qualifications and are residents of the State of Maine, and in fact serves such Maine residents, Plaintiff has conducted and operated principally for the benefit of persons who are not residents of the State of Maine.

4. Defendants are the Inhabitants of the Town of Harrison, a municipal corporation organized under Maine law, and Susan Searles, Michael Darcy, Paul Kilgore, Albert Haggerty and Robert Baker, residents of Harrison, only in their official capacity as the municipal officers and assessors for the Town, and Michael Thorne in his official capacity as Harrison Tax Collector. Defendants have responsibility for assessing and collecting taxes (and granting exemptions) in the Town of Harrison as well as for enforcing the provisions of 36 M.R.S.A. § 652(1)(A) of the laws of Maine.

GENERAL ALLEGATIONS

5. Plaintiff has requested exemption from taxation under the provisions of 36 M.R.S.A. § 652(1)(A) and § 841(1), both currently and for 3 years in arrears, but Defendants have denied that request because of the provisions of § 652(1)(A)(1) which disallow the exemption to institutions that are in fact conducted and operated principally for the benefit of persons who are not residents of Maine. *See* Exhibits A and B attached. Plaintiff has received no exemption for its status as a charitable and benevolent institution, but has been required in the past unlawfully to pay taxes on its property as if it were a corporation for profit. Plainitff has paid such taxes in order to protect its property from tax liens and forfeiture.

6. The acts and practices of Defendants in assessing and collecting taxes from Plaintiff and denying its exemptions were performed under color of law, constitute official policy of Defendant Town and therefore constitute actions of the State pursuant to the commerce clause, the privileges and immunities clause, and the 14th Amendment to the United States Constitution.

7. 36 M.R.S.A. § 652(1)(A) exempts from taxation the real and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State. Subsection (1)(A)(1) of this statute then denies or qualifies the exemption to any "such institution which is in fact conducted or operated principally for the benefit of persons who are not residents of Maine . . ." Plaintiff is denied any exemption under this statutory subsection. Subsection (1)(A)(1), therefore, discriminates on its face against institutions which are involved in interstate commerce and unlawfully burdens those institutions in favor of local interests.

8. The commerce clause, the privileges and immunities clause of Article IV, and the due process, equal protection and the privileges and immunities clauses of the 14th

Amendment of the United States Constitution prohibit states from discriminating against institutions which are involved in interstate commerce in favor of local concerns thereby legitimating and establishing a form of local economic protectionism. Plaintiff has a right under these provisions of the United States Constitution and the equal protection clause of the Maine Constitution to be treated fairly and in a non-discriminatory fashion along with other charitable institutions in the State of Maine.

COUNT I

Declaratory And Injunctive Relief Under Declaratory Judgments Act

9. Plaintiff re-alleges the allegations of paragraphs 1 through 8 as set forth above.

10. Because of Defendants' unreasonably high and unlawful assessments and collections against Plaintiff, has been forced to seek abatements on an administrative level and in the courts of the State of Maine, to expend attorney's fees and to litigate a tax abatement for 1989 when Plaintiff should be exempt as are charitable institutions that operate primarily for the benefit of the residents of Maine. Plaintiff is currently involved in a legal challenge with Defendants regarding the assessment of 1990 property taxes.

11. There is between the parties an actual controversy as hereinbefore set forth. Plaintiff is suffering irreparable injury and is threatened with irreparable harm in the future by reason of the unconstitutional acts herein complained of. A substantial impairment of Plaintiff's right to engage in interstate commerce has been and is being impaired so long as Defendants continue in their course of conduct. Plaintiff has no plain, adequate or complete remedy at law.

WHEREFORE, Plaintiff seeks judgment:

A. Declaring 36 M.R.S.A. § 652(1)(A)(1) unconstitutional on its face and as applied against Plaintiff under both the U.S. Constitution and the Maine Constitution.

B. Granting Plaintiff a preliminary and permanent injunction enjoining Defendants, their agents, employees, and those acting in concert with them, from enforcing 36 M.R.S.A. § 652(1)(A)(1) and maintaining a practice and policy of tax discrimination against exempt corporations that serve non-residents.

C. Awarding Plaintiff its reasonable costs and expenses herein.

D. Granting Plaintiff such other and further relief as the Court may deem just and proper including, but not limited to, reimbursements of taxes paid, plus interest, pursuant to 36 M.R.S.A. § 841(1) for all years in question.

COUNT II

Relief Under Civil Rights Act 42 U.S.C. § 1983

12. Plaintiff reallages the allegations of paragraphs 1 through 11 as set forth above.

13. Defendants have caused Plaintiff to be deprived of its rights, privileges and immunities secured by the United States Constitution and have violated the provisions of 42 U.S.C. § 1983 thereby subjecting themselves to liability for equitable and legal relief.

WHEREFORE, Plaintiff seeks judgment against Defendants and each of them:

A. Declaring 36 M.R.S.A. § 652(1)(A)(1) unconstitutional on its face and as applied against Plaintiff.

B. Granting Plaintiff a preliminary and permanent injunction enjoining Defendants, their agents, employees, and those acting in concert with them, from enforcing 36

M.R.S.A. § 652(1)(A)(1) and maintaining a practice and policy of tax discrimination against exempt corporations that serve non-residents.

C. Awarding Plaintiff its reasonable costs and expenses herein.

D. Granting Plaintiff judgment against Defendants, and each of them jointly and severally, for compensatory damages in the amount of $60,000 for the current year and the last three years in arrears of taxes paid, plus interest.

E. Awarding Plaintiff reasonable attorney's fees pursuant to 42 U.S.C. § 1983 and § 1988.

F. Granting Plaintiff such other and further relief as the Court may deem just and proper.

DATED at Portland, Maine this 3rd day of June, 1992.

By: /s/ William H. Dale
WILLIAM H. DALE, ESQ.
Attorney for Plaintiff

Jensen Baird Gardner & Henry
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

EXHIBIT A

April 15, 1992

Mr. Michael Thorne, Town Manager
Town Hall
Main Street
P.O. Box 300
Harrison, Maine 04040

Dear Mr. Thorne,

This letter is a formal request for a tax refund and for a continuing exemption from future property taxes pursuant to 36 M.R.S.A. Section 652(1)(A). As you know, Camps Newfound/Owatonna Corporation is organized as a non-profit corporation under Maine law and conducts itself as a charitable and benevolent institution pursuant to the above noted statute. We have operated as such for many years on the same property in Harrison and have never been granted the tax exempt status to which we are entitled.

It is true that we have not been fortunate enough to draw the principal number of our children from the state of Maine and that on the face of subsection (1) the statute we would not be entitled to the exemption for that reason. However, it is apparent that the subsection under which we have been denied an exemption is invalid and discriminatory and therefore in violation of the United States Constitution, Article I, section 8, clause 3 (the commerce clause), Article 4, section 2, clause 1 (the privileges and immunities clause), and the equal protection and due process clauses of the fourteenth amendment. See, for example, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

We request that you acknowledge our exemption and that you refund the taxes which we paid but did not owe for 1989, 1990, and 1991. Please contact us as soon as possible so that we can take the appropriate steps with regard

to the upcoming abatement hearing. Granting our request and rightly acknowledging the invalidity of 36 M.R.S.A. Section 652(1)(A)(1) will render the abatement hearing moot and prevent us all from accumulating more legal fees. Should you deny our request, it may be best to postpone the abatement hearing on the 1990 taxes until a court of law can resolve the constitutionality of the discriminatory subsection.

Thank you for considering this most important request and for your forthcoming reply.

Sincerely,

EXHIBIT B

TOWN OF HARRISON
Telephone 583-2241

May 6, 1992

Glenn C. Johnson, Chairman
Camps Newfound/Owatonna Corporation
RR2 Timberwood Place
South Salem, N.Y. 10590

RE: Refund and Exemption Request

Dear Mr. Johnson:

Following review of your request for a tax refund and exemption from property taxes, and review of the applicable Maine statute, the Board of Assessors have voted to deny your request. It is not the role nor duty of the Board of Assessors to pass judgement on or overrule a law of the State of Maine. Therefore, there can be no other action by the Assessors then to deny your request.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Michael J. Thorne
MICHAEL J. THORNE
Town Manager

MJT/b

cc: Board of Assessors
William L. Plouffe, Attorney for the Town

P.O. Box 300
(Intersection of Routes 35 & 117)
Harrison, Maine 04040

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA, INC.,
a Maine Non-Profit Corporation,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, SUSAN SEARLES, MICHAEL DARCY, PAUL KILGORE, ALBERT HAGGERTY and ROBERT BAKER, as the Harrison Municipal Officers and Assessors, and MICHAEL THORNE as the Harrison Tax Collector,
Defendants

ANSWER OF DEFENDANTS INHABITANTS OF THE TOWN OF HARRISON, SUSAN SEARLES, MICHAEL DARCY, PAUL KILGORE, ALBERT HAGGERTY, ROBERT BAKER AND MICHAEL THORNE

NOW COME the Defendants, by and through their attorney, and answer the Complaint as follows:

CAUSE OF ACTION AND JURISDICTION

1. In response to the allegations contained in the first sentence of paragraph 1 of the Complaint, Defendants state that it contains characterizations of the Complaint and conclusions of law which do not require a response. In response to the allegations contained in the second sentence of pargraph 1 of the Complaint, Defendants deny that this Court has jurisdiction.

2. Paragraph 2 of the Complaint contains characterizations of the Complaint which do not require a response in that the Complaint speaks for itself. To the extent that a response is required, Defendants deny the allegations contained in paragraph 2 of the Complaint.

PARTIES

3. In response to paragraph 3 of the Complaint, Defendants admit that tax records kept by the Town of Harrison show that the Plaintiff owns real property within the Town. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the Complaint.

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

GENERAL ALLEGATIONS

5. In response to the allegations contained in the first sentence of paragraph 5 of the Complaint, Defendants state that Exhibits A and B speak for themselves and further state that the exemption requests are legally insufficient. In response to the allegations contained in the second sentence of paragraph 5 of the Complaint, Defendants admit that the Plaintiff has not received a tax exemption but deny that requiring payment of taxes by the Plaintiff has been illegal. In response to the allegations contained in the third sentence of paragraph 5 of the Complaint, Defendants admit that such taxes have been paid but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said sentence.

6. In response to the allegations contained in paragraph 6 of the Complaint, Defendants admit that they assessed and collected taxes from the Plaintiff. The remaining allegations contained in paragraph 6 are conclusions of law which do not require a response but, to the extent that a response is required, the Defendants deny the conclusions asserted.

7. The first and second sentences of paragraph 7 of the Complaint contain characterizations of a statute and do not require a response. The third and fourth sentences

in paragraph 7 contain conclusions of law which do not require a response but, to the extent that a response is required, the Defendants deny the conclusions asserted.

8. Paragraph 8 of the Complaint contains characterizations and conclusions of law which do not require a responce but, to the extent that a response is required, the Defendants deny the conclusions asserted.

COUNT I

9. Defendants repeat and reallege the answers contained in paragraphs 1 through 8 above as if set forth fully herein.

10. Defendants deny the allegations contained in the first sentence of paragraph 10 of the Complaint. In response to the second sentence of paragraph 10, Defendants admit that the Plaintiff has applied for a partial abatement of its 1990 taxes, which abatement was denied by the Town of Harrison assessors, and that the denial has been appealed by the Plaintiff to the Cumberland County Commissioners.

11. Defendants deny the allegations contained in paragraph 11 of the Complaint.

WHEREFORE, Defendants request judgment against Plaintiff with costs and attorney's fees for defense of this action.

COUNT II

12. Defendants repeat and reallege the answers contained in paragraphs 1 through 11 as if set forth in full herein.

13. Defendants deny the allegations contained in paragraph 13 of the Complaint.

WHEREFORE, Defendants request judgment against Plaintiff with costs and attorney's fees for defense of this action.

AFFIRMATIVE DEFENSES

First Affirmative Defense

With respect to tax years 1989 and 1990, Plaintiff is precluded from relief by the doctrines of waiver, *res judicata* and collateral estoppel.

Second Affirmative Defense

The Plaintiff's claims are not ripe for review since Plaintiff has failed to exhaust its administrative remedies.

Third Affirmative Defense

Count II of the Complaint fails to state a claim upon which relief can be granted.

Fourth Affirmative Defense

This Court lacks subject matter jurisdiction over the claims asserted.

Fifth Affirmative Defense

The Plaintiff has failed to join an indispensable party, to wit: the State of Maine.

Sixth Affirmative Defense

The Plaintiff's claim for damages is barred by the doctrine of Sovereign Immunity.

WHEREFORE, Defendants request judgment against Plaintiff with costs and attorney's fees for defense of this action.

DATED: July 9, 1992

/s/ William L. Plouffe
WILLIAM L. PLOUFFE, ESQ.
Attorneys for Defendants

Drummond Woodsum Plimpton
& MacMahon
245 Commercial Street
Portland, ME 04101
(207) 772-1941

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA, INC.,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, *et als.*,
Defendants

and

STATE OF MAINE,
Intervenor

MOTION TO AMEND COMPLAINT

NOW COMES Plaintiff, by and through its undersigned counsel, and moves to amend its complaint as follows: first, by amending the caption and paragraph 3 of the complaint to change its name from "Camps Newfound/Owatonna, Inc." to "Camps Newfound/Owatonna Corporation" to conform with the correct designation as shown by its original articles of merger from 1986 and the certificate from the Secretary of State's office indicating "Camps Newfound/Owatonna Corporation" to be the correct name; and second, to amend paragraph 3 of the complaint to recognize the minor easements on the property held by Loon Echo Inland Trust, Central Maine Power Company and New England Telephone Company. A copy of the proposed amendment is attached.

Pursuant to Rule 15(c), Maine Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." *See McKinnon v. Tibbets*, 440 A.2d 1028

(Me. 1982); Field, McKusick & Wroth, *Maine Civil Practice*, § 15.4. Here, in order to correct two technical errors in the pleadings, Plaintiff has moved for this amendment. Given the fact that there are no similarly named corporations in Defendants' area and that the parties recently litigated a related matter, *see Camps Newfound/Owatonna v. Town of Harrison*, 604 A.2d 908 (Me. 1992), there has been no confusion or prejudice to Defendants on the name change. Similarly, the three minor easements on the property do not effect the issues raised by the case, but are being recognized in the interests of complete accuracy regarding Plaintiff's title. Therefore, the interest of justice requires granting of this Motion to Amend.

DATED at Portland, Maine this 23rd day of February, 1993.

By: /s/ William H. Dale
WILLIAM H. DALE, ESQ.
Attorney for Plaintiff

JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA CORPORATION,
a Maine Non-Profit Corporation,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, SUSAN SEARLES, MICHAEL DARCY, PAUL KILGORE, ALBERT HAGGERTY and ROBERT BAKER, as the Harrison Municipal Officers and Assessors, and MICHAEL THORNE as the Harrison Tax Collector,
Defendants

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, AND FOR DAMAGES

Plaintiff sues Defendants and each of them and alleges:

CAUSE OF ACTION AND JURISDICTION

1. This action is commenced pursuant to the Maine Declaratory Judgments Act, 14 M.R.S.A. §§ 5951-63, and pursuant to the provisions of 42 U.S.C. § 1983 to secure the rights of Plaintiffs under Article I, section 8, cl. 3 (the Commerce Clause); under Article IV, section 2, cl. 1 (the Privileges and Immunities Clause); and under the 14th Amendment to the Constitution of the United States, including its privileges and immunities clause, equal protection clause, and due process clause; and under Article I, section 6-A of the Constitution of the State of Maine. This court has jurisdiction under 14 M.R.S.A. §§ 5951-63.

2. This is a suit for declaratory and injunctive and other affirmative relief to alleviate discrimination in the law of the State of Maine which unlawfully burdens interstate commerce and which illegally and unconstitutionally discriminates against Maine non-profit corporations that have out-of-state interests. Plaintiff is seeking, among other relief, a declaration that 36 M.R.S.A. § 652(1)(A)(1) is unconstitutional on its face and as applied under the aforementioned provisions of the United States Constitution and the Maine Constitution; an injunction against further enforcement of the statute; and reimbursement of taxes and interest illegally assessed and collected pursuant to that statute.

PARTIES

3. Plaintiff Camps Newfound/Owatonna Corporation is a benevolent and charitable institution for purposes of 36 M.R.S.A. § 652(1)(A) and is organized under Title 13-B of the laws of the State of Maine as a non-profit corporation. Plaintiff owns real property in and its main office is located in Harrison, Maine; the property is used and occupied solely by Plaintiff for its benevolent and charitable purposes (excepting only that its property is subject to: (i) a term conservation easement to Loon Echo Land Trust, Inc. which is also a benevolent and charitable institution within the meaning of 36 M.R.S.A. § 652(1)(A) and § 652(1)(J) and which conservation easement grants Loon Echo no affirmative use rights, but rather serves only to limit Plaintiff's use of the property), (ii) a standard utility pole easement in favor of New England Telephone Company and (iii) a standard utility line easement in favor of Central Maine Power Company. Although Plaintiff is open to and welcomes persons who meet its qualifications and are residents of the State of Maine, and in fact serves such Maine residents, Plaintiff has conducted and operated principally for the benefit of persons who are not residents of the State of Maine.

4. Defendants are the Inhabitants of the Town of Harrison, a municipal corporation organized under Maine law, and Susan Searles, Michael Darcy, Paul Kilgore, Albert Haggerty and Robert Baker, residents of Harrison, only in their official capacity as the municipal officers and assessors for the Town, and Michael Thorne in his official capacity as Harrison Tax Collector. Defendants have responsibility for assessing and collecting taxes (and granting exemptions) in the Town of Harrison as well as for enforcing the provisions of 36 M.R.S.A. § 652 (1)(A) of the laws of Maine.

GENERAL ALLEGATIONS

5. Plaintiff has requested exemption from taxation under the provisions of 36 M.R.S.A. § 652(1)(A) and § 841(1), both currently and for 3 years in arrears, but Defendants have denied that request because of the provisions of § 652(1)(A)(1) which disallow the exemption to institutions that are in fact conducted and operated principally for the benefit of persons who are not residents of Maine. *See* Exhibits A and B attached. Plaintiff has received no exemption for its status as a charitable and benevolent institution, but has been required in the past unlawfully to pay taxes on its property as if it were a corporation for profit. Plaintiff has paid such taxes in order to protect its property from tax liens and forfeiture.

6. The acts and practices of Defendants in assessing and collecting taxes from Plaintiff and denying its exemptions were performed under color of law, constitute official policy of Defendant Town and therefore constitute actions of the State pursuant to the commerce clause, the privileges and immunities clause, and the 14th Amendment to the United States Constitution.

7. 36 M.R.S.A. § 652(1)(A) exempts from taxation the real and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State. Subsection (1)(A)(1) of this statute then denies or qualifies the exemption to any "such institution which is in fact conducted or operated principally for the benefit of persons who are not residents of Maine . . ." Plaintiff is denied any exemption under this statutory subsection. Subsection (1)(A)(1), therefore, discriminates on its face against institutions which are involved in interstate commerce and unlawfully burdens those institutions in favor of local interests.

8. The commerce clause, the privileges and immunities clause of Article IV, and the due process, equal protection and the privileges and immunities clauses of the 14th Amendment of the United States Constitution prohibit states from discriminating against institutions which are involved in interstate commerce in favor of local concerns thereby legitimating and establishing a form of local economic protectionism. Plaintiff has a right under these provisions of the United States Constitution and the equal protection clause of the Maine Constitution to be treated fairly and in a non-discriminatory fashion along with other charitable institutions in the State of Maine.

COUNT I

Declaratory And Injunctive Relief Under Declaratory Judgments Act

9. Plaintiff re-alleges the allegations of paragraphs 1 through 8 as set forth above.

10. Because of Defendants' unreasonably high and unlawful assessments and collections against Plaintiff, Plaintiff has been forced to seek abatements on an administrative level and in the courts of the State of Maine, to expend attorney's fees and to litigate a tax abatement for 1989 when Plaintiff should be exempt as are charitable institutions that operate primarily for the benefit of the residents of Maine. Plaintiff is currently involved in a legal challenge with Defendants regarding the assessment of 1990 property taxes.

11. There is between the parties an actual controversy as hereinbefore set forth. Plaintiff is suffering irreparable injury and is threatened with irreparable harm in the future by reason of the unconstitutional acts herein complained of. A substantial impairment of Plaintiff's right to engage in interstate commerce has been and is being impaired so long as Defendants continue in their course of conduct. Plaintiff has no plain, adequate or complete remedy at law.

WHEREFORE, Plaintiff seeks judgment:

A. Declaring 36 M.R.S.A. § 652(1)(A)(1) unconstitutional on its face and as applied against Plaintiff under both the U.S. Constitution and the Maine Constitution.

B. Granting Plaintiff a preliminary and permanent injunction enjoining Defendants, their agents, employees, and those acting in concert with them, from enforcing 36 M.R.S.A. § 652(1)(A)(1) and maintaining a practice and policy of tax discrimination against exempt corporations that serve non-residents.

C. Awarding Plaintiff its reasonable costs and expenses herein.

D. Granting Plaintiff such other and further relief as the Court may deem just and proper including, but not limited to, reinmbursements of taxes paid, plus interest, pursuant to 36 M.R.S.A. § 841(1) for all years in question.

COUNT II

Relief Under Civil Rights Act 42 U.S.C. § 1983

12. Plaintiff realleges the allegations of paragraphs 1 through 11 as set forth above.

13. Defendants have caused Plaintiff to be deprived of its rights, privileges and immunities secured by the

United States Constitution and have violated the provisions of 42 U.S.C. § 1983 thereby subjecting themselves to liability for equitable and legal relief.

WHEREFORE, Plaintiff seeks judgment against Defendants and each of them:

A. Declaring 36 M.R.S.A. § 652(1)(A)(1) unconstitutional on its face and as applied against Plaintiff.

B. Granting Plaintiff a preliminary and permanent injunction enjoining Defendants, their agents, employees, and those acting in concert with them, from enforcing 36 M.R.S.A. § 652(1)(A)(1) and maintaining a practice and policy of tax discrimination against exempt corporations that serve non-residents.

C. Awarding Plaintiff its reasonable costs and expenses herein.

D. Granting Plaintiff judgment against Defendants, and each of them jointly and severally, for compensatory damages in the amount of $60,000 for the current year and the last three years in arrears of taxes paid, plus interest.

E. Awarding Plaintiff reasonable attorney's fees pursuant to 42 U.S.C. § 1983 and § 1988.

F. Granting Plaintiff such other and further relief as the Court may deem just and proper.

DATED at Portland, Maine this 23rd day of February, 1993.

By: /s/ William H. Dale
WILLIAM H. DALE, ESQ.
Attorney for Plaintiff

Jensen Baird Gardner & Henry
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA CORPORATION,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, *et als.*,
Defendants

PLAINTIFF'S SUMMARY JUDGMENT FACTUAL RECORD

WILLIAM H. DALE, ESQ.
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

PLAINTIFF'S SUMMARY JUDGMENT FACTUAL RECORD

Table of Contents

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA CORPORATION,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, *et als.*,
Defendants

PLAINTIFF'S STATEMENT OF UNCONTESTED FACTS

Pursuant to M.R. Civ. P. 56 and 7(d), Plaintiff submits the following as its listing of uncontested material facts for purposes of its pending Motion for Summary Judgment. Unless otherwise stated, these statements are true for each of the three years at issue.

1. The Complaint was filed on June 3, 1992 and amended on March 4, 1993.

2. The State of Maine intervened as a Defendant on August 3, 1992.

3. The Municipal Defendants and Defendant-State filed a Motion for Judgment on the Pleadings on October 9, 1992, which was briefed by the parties, argued before the Superior Court on or about December 29, 1992 and is presently under advisement.

4. Pursuant to a letter dated April 15, 1992 from Glen Johnson, the chairman of its board of trustees, Plaintiff demanded that the Municipal Assessors grant it tax exempt status. *See* Defendants' Response to First Request for Admissions No. 6; Defendants' Answer to Interrogatory No. 11. This was the first time Plaintiff requested total exemption from municipal real estate taxes for its property. Stipulation No. 11.

5. In Harrison, the five individuals who serve as the Board of Selectmen/Municipal Officers also serve as the Assessors. Defendants' Response to Second Request for Admissions No. 9.

6. The Municipal Assessors denied Plaintiff's request for exemption by letter dated May 6, 1992 because Plaintiff serves principally nonresidents. In that letter, they stated: "Following review of your request for a tax refund and exemption from property taxes, and review of the applicable Maine statute, the Board of Assessors have voted to deny your request. It is not the role nor duty of the Board of Assessors to pass judgment on or overrule a law of the State of Maine. Therefore, there can be no other action by the Assessors then to deny your request." Defendants' Response to First Request for Admissions No. 6, Defendants' Answers to Interrogatories Nos. 3, 10 and 11.

7. Plaintiff's request for a property tax abatement for 1990, based on a change in valuation attributable to a conservation easement, is presently pending before the Cumberland County Commissioners and all parties, including the County Commissioners, have agreed to stay that proceeding pending final disposition of this action. Stipulation No. 12.

8. Defendant Assessors admit that they assess taxes and, where appropriate, grant exemptions and Defendant Tax Collector admits that he collects the same pursuant to Maine law. Defendants' Response to First Request for Admissions No. 8; Defendants' Response to Second Request for Admissions No. 12; Plaintiff's Answer to Interrogatory No. 13; and Plaintiff's Answers to Paragraphs 4 and 6 of the Complaint.

9. Plaintiff is a Maine non-profit corporation in good standing. Defendants' Response to Second Request for Admissions No. 10; Stipulation No. 2.

10. Plaintiff's Articles of Incorporation resulted from a plan of merger of two predecessor corporations: Owatonna Camp for Boys Association being merged into Newfound Camp for Girls Association in 1986. The purposes of Plaintiff corporation as set out in such Articles of Merger or Articles of Incorporation are as follows:

> The purposes of said corporation are to provide for an organized, incorporated entity through which a summer camp for boys and girls may be owned and operated in the Town of Harrison and State of Maine, or in other towns, cities or plantations within or without the State of Maine, exclusively for the special accommodation, training, education and philosophical enlightenment and development of boys and girls who are interested in the spiritual doctrines, teachings and application of Christian Science, so called, as discovered and founded by Mary Baker Eddy . . . to the benefit and advantage of this Corporation and the boys and girls who may from time to time be taking advantage of the services and teachings it shall make available, all without limitation with regard to such boys and girls because of race, creed or color and all without profit to the Corporation or to any member of the Corporation or to any individual, without limiting, however, the payment of salaries and expenses to such of the trustees and other employees who shall be employed by the Corporation.

Affidavit of Susan Smith at ¶ 4.

11. Plaintiff's by-laws, last amended in August of 1988, provide in Article II for the same purpose as recited above for corporate purposes under the Articles of Incorporation and further provide in Sec. 1 of Article III of the by-laws as follows:

> Sec. 1. The affairs of this corporation shall be administered for the purpose of meeting the religious and educational needs and desires of boys and girls of an age when they may be interested in attending summer camp where such educational and religious teachings are made available.
>
> Sec. 2. Neither this corporation, any trustee or other officer hereof or member hereof shall be entitled to any personal profits from the existence or the operations of this corporation in any manner whatsoever, excepting only that the salary of the general manager or nominal or reimbursement compensation for expenses disbursed or incurred for the benefit of this corporation and bona vide reasonable compensation for bona vide services rendered for the benefit of the corporation.

Article VIII provides as follows:

> . . . [N]o amendment shall be made which shall have affect or change the non-profit and benevolent position or structure of this corporation, nor which shall allow or provide for any personal profit or benefit to be received by any trustee hereof, or any officer hereof, whether directly or indirectly, nor which shall in any way affect the position of this corporation or donors or contributors of funds to this corporation under Sections 170(c)(2)(B) of IRC 1954 and 501(c)(3) of IRC 1954.

Article IX of the by-laws provides as follows:

> Upon final termination of the activities of this corporation or upon dissolution thereof, the trustees shall liquidate the assets of this corporation in such manner and upon such terms and conditions as they deem reasonable and fair

and thereafter shall turn over and donate as a gift the proceeds of such liquidation without consideration to the First Church of Christ Scientist in Boston, Massachusetts, for such religious and charitable use as said Church shall determine.

Affidavit of Susan Smith at ¶ 4.

12. Plaintiff's summer camp is run exclusively for the benefit of children of the Christian Science faith. Campers range in age from seven to sixteen. Many, but not all, campers return season after season; indeed, in some cases, the children are third or fourth generation campers. The number of campers, their length of stay, average tuition and the like are shown on Exhibit 1 attached hereto and made a part hereof. This is the same Exhibit provided to Defendants in Plaintiff's answer to Interrogatory No. 29. Affidavit of Susan Smith at ¶¶ 10, 11 and 12.

13. For each of the years in dispute, Plaintiff qualified as a Sec. 501(c)(3) corporation under the Internal Revenue Code. Stipulation No. 5; Defendants' Response to Second Request for Admissions No. 13.

14. The Municipal Defendants are unaware of any evidence, whether documentary or otherwise, showing or tending to show that Plaintiff was not a "charitable and benevolent institution," as that term is used in 36 M.R.S.A. § 652(1)(A). Defendants' Response to Second Request for Admissions No. 8.

15. Plaintiff conducted its activities at all times in accordance with the purposes stated in its Charter and by-laws. Affidavit of Susan Smith at ¶ 5.

16. Pursuant to Plaintiff's Charter, by-laws and Misssion Statement, Plaintiff's camp is conducted with the intention that, although not financially self-supporting, operation of the camp helps the children to grow spiritually, mentally and physically in accordance

with the tenets of the Christian Science faith and thereby to become good citizens in society as adults. In keeping with Plaintiff's strong Christian Science influence over daily activities at the camp, supervised prayer or meditation sessions are conducted each day in addition to regular church services on Sunday. Affidavit of Susan Smith at ¶¶ 3 and 10.

17. As shown by Plaintiff's IRS Form-990 filings, the revenues which it receives, whether from tuitions or otherwise, are far less than the operating costs to run the camps annually; indeed, it takes approximately $175,000 per year in charitable donations from Plaintiff's contributors to make up for the annual operational deficit. Affidavit of Susan Smith at ¶ 7.

18. While admission to Plaintiff's camp is open to children pursuing the Christian Science faith without regard to race, color or creed, Plaintiff does in fact provide full and partial scholarships for some campers. Affidavit of Susan Smith at ¶ 8.

19. Plaintiff is operated in good faith to serve the legitimate purposes stated in its Chapter, by-laws and Mission Statement and in no way has been established or operated under pretense or pretext to avoid taxation. Affidavit of Susan Smith at ¶ 9; Defendants' Response to Second Request for Admissions No. 8; Plaintiff's Answer to Interrogatory No. 22.

20. Pursuant to Plaintiff's Charter and by-laws and, in fact, Plaintiff receives no revenue other than that which is directly related to running its benevolent and charitable summer camp for children in the Christian Science faith. In particular, Plaintiff receives no revenues or income from renting out its real property, equipment or personnel for such private purposes as weddings, corporate retreats or the

like. Affidavit of Susan Smith at ¶ 4; Plaintiff's Answer to Interrogatory No. 19.

21. The only revenue received by Plaintiff is camper tuitions, which fail to cover the cost of operation of the camp, charitable and benevolent contributions made by private donors to fund the operating deficit, and income from Plaintiff's modest endowment. Affidavit of Susan Smith at ¶ 7; Plaintiff's Answer to Interrogatory No. 22.

22. For each of the years in dispute (1989, 1990, 1991), Plaintiff owned the real property in question. Stipulation No. 1; Defendants' Response to First Request for Admissions No. 12. Plaintiff's property is unencumbered by any mortgages. Affidavit of Susan Smith at ¶ 4.

23. The NET and CMP easements on Plaintiff's property do not defeat Plaintiff's tax exemption status. Stipulation No. 9.

24. For each of the years in dispute, Loon Echo Inland Trust, Inc. was a Maine non-profit corporation and a benevolent and charitable institution within the meaning of 36 M.R.S.A. § 652(1)(A). Stipulation No. 4.

25. Subject only to the easements to NET, CMP and Loon Echo Inland Trust, Plaintiff's property is occupied solely by it for its charitable and benevolent purposes; in particular, no private functions such as weddings, corporate retreats or the like are conducted on Plaintiff's property. Affidavit of Susan Smith at ¶ 4; Plaintiff's Answer to Interrogatories No. 16 and 17.

26. Plaintiff's real estate taxes assessed as of April 1, 1989 amounted to $24,639.65 and have been paid in full. Defendants' Response to First Request for Admissions No. 2.

27. Plaintiff's real estate assessed as of April 1, 1990 amounted to $21,618.49 and have been paid in full. Defendants' Response to First Request for Admissions No. 3.

28. Plaintiff's real estate taxes assessed as of April 1, 1991 amounted to $20,770.71 (plus $994.70 for personal property) and have been paid in full. Defendants' Response to First Request for Admissions No. 4.

29. Plaintiff's exemption has not been denied by reason of the source from which its funds are derived. Defendants' Response to First Request for Admissions No. 13. Payment of over $20,000 a year in real estate taxes serves to aggravate Plaintiff's annual operating deficit and, to a certain extent, percludes Plaintiff from retaining certain supplemental services for its campers, such as outside art and music consultants. Further, to some extent, the cost of the property taxes is passed along to campers in the form of increased tuition. Affidavit of Susan Smith at ¶ 13.

30. For each of the years in dispute, Plaintiff's average weekly charge for campers exceeded $30 per week. Stipulation No. 6.

31. No director, trustee, officer or employee of any organization claiming exemption received directly or indirectly any pecuniary profit from the operation thereof, excepting reasonable compensation for services in effecting its purposes or as a proper beneficiary of its strictly benevolent or charitable purposes. Plaintiff's Answers to Interrogatories No. 22 and 24.

32. Plaintiff has no profits, but all of its revenue derived from the operation of its camp and the proceeds from any possible sale of its property are devoted exclusively to the purposes for which it is

organized. Affidavit of Susan Smith at ¶ 7; Plaintiff's Answer to Interrogatory No. 25.

33. Plaintiff has not failed to file with the Tax Assessors upon their request a report for its preceding year in such details as the Assessors may reasonably have required. Defendants' Response to First Request for Admissions No. 16. Plaintiff complied with any applicable filing requirements under 36 M.R.S.A. § 706. Defendants' Response to Second Request for Admissions No. 7.

34. Plaintiff is not an agricultural fair association holding parimutuel racing meets. Defendants' Response to First Request for Admissions No. 17.

35. For each of the years in dispute, more than 50% of Plaintiff's campers were non-resident. Stipulation No. 3. Indeed, in each of the years in question, approximately 95% of the campers were non-residents. Plaintiff's Answer to Interrogatory No. 29 (Exhibit D). Plaintiff's camp is the only Christian Science summer camp in New England. Affidavit of Susan Smith at ¶ 14.

36. For each of the years in dispute, Plaintiff successfully recruited campers as well as charitable donations from both Maine and other states. Stipulation No. 7. Not only has Plaintiff successfully recruited campers and charitable donations from states other than Maine, but Plaintiff advertises for campers in periodicals in states outside of Maine and sends its Executive Director annually on camper recruiting trips across the country. Affidavit of Susan Smith at ¶ 15.

37. For each of the years in dispute, there were benevolent and charitable institutions incorporated in Maine which were not in fact conducted or operated principally for the benefit of persons who are not residents of Maine and which received property tax exemptions under 36 M.R.S.A. § 652(1)(A). Stipulation No. 8.

38. For each of the years in dispute, there were benevolent and charitable institutions incorporated in Maine which were in fact conducted or operated principally for the benefit of persons who are not residents of Maine and which were denied property tax exemptions under 36 M.R.S.A. § 652(1)(A)(1) because of such non-residents. Stipulation No. 10.

39. In a prior action, Plaintiff had sought judicial review of a partial abatement granted by the Assessors with respect to the 1989 tax valuation, but did not challenge the validity of the exemption statute in that proceeding. *See Camps Newfound/Owatonna v. Town of Harrison,* 604 A.2d 908 (Me. 1992).

DATED at Portland, Maine this 9th day of April, 1993.

By: /s/ William H. Dale
WILLIAM H. DALE, ESQ.
Attorney for Plaintiff

JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

EXHIBIT D
(Answer to Interrogatory No. 29)

Year	1989	1990	1991	1992
Camper Enrollment	271	234	239	248
Family Camp Enrollment	308	170	226	222
Regular Camp Capacity	400	400	400	400
Family Camp Capacity	300	300	300	300
% Maine Campers	4%	5%	4%	4%
Average Length of Stay: Regular Camp	4 weeks	4 weeks	4 weeks	4 weeks
Tuition/Fees	$370/wk	$408/wk	$425/wk	$445/wk

Note: Please note that with regard to enrollment and capacity, these figures are subject to minor adjustment to reflect the fact that some campers stay for the entire 7-week summer camp season while others attend for only 3 weeks or 4 weeks.

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA CORPORATION,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, *et als.*,
Defendants

AFFIDAVIT OF SUSAN SMITH, CHAIRMAN OF PLAINTIFFS—CAMPS NEWFOUND/OWATONNA CORPORATION

I, Susan Smith, being first duly sworn, do depose and say as follows:

1. My name is Susan Smith, I am a resident of Montecito, California, and make the statements contained herein based upon my personal knowledge of their truth.

2. I currently serve as Chariman of the Board of Trustees for Camps Newfound/Owatonna Corporation, Plaintiff in the civil action pending in Superior Court (Cumberland County) in Portland, Maine under docket number CV-92-658.

3. For all years in dispute in this litigation, Plaintiff has in fact conducted its operation in accordance with its Charter, Bylaws and Mission Statement in good faith in running a summer camp for boys and girls of the Christian Science faith to promote their growth spiritually, mentally and physically in accordance with the express purpose laid out in the Charter and Bylaws.

4. Plaintiff owns the real property in question located on the generally easterly side of Long Lake in Harrison, Maine and has occupied and used that property exclu-

sively for its own benevolent and charitable purposes as identified in its corporate Charter and Bylaws; the property is unencumbered by any mortgage; and the property has not been rented or otherwise used for any private, for profit purposes such as wedding receptions, corporate retreats or the like.

5. At all times relevant to this litigation, Plaintiff has been organized and conducted its activities exclusively in furtherance of the benevolent and charitable purposes articulated in its Charter and Bylaws.

6. No director, trustee, officer or employee has, directly or indirectly, derived any pecuniary profit from Plaintiff's operations excepting reasonable compensation for services rendered in affecting the Corporation's benevolent and charitable purposes for which it is organized.

7. For all years at issue in this litigation, Plaintiff has earned no profit, but rather has operated at a net revenue loss annually, which loss has been made up by charitable contributions in the amount of approximately $175,000 per year and income from the Plaintiff's modest endowment. Any and all revenues generated from Plaintiff's operations have been devoted exclusively to its charitable and benevolent corporate purposes, i.e., running its summer camp.

8. The fees charged by Plaintiff for camper tuition, although reasonable, fail to generate sufficient revenue to offset the reasonable costs of running the camp. Despite these deficit operating situations, Plaintiff has also provided scholarship aid to those campers who could not afford the tuition.

9. At all times relevant to this litigation, Plaintiff has been operating in good faith with reference to its corporate charitable and benevolent corporate purposes and has in no event engaged in any pretense to avoid taxation; on the contrary, Plaintiff has sought and received IRS status as a Sec. 501(c)(3) corporation and filed

so-called IRS Form-990's annually as a charitable corporation under federal tax law.

10. All the children who attend as campers are members of the Christian Science faith. In accordance with the Plaintiff's Charter and Bylaws, Plaintiff's goal for its campers is to run an institution that, although not financially self-supporting, nonetheless helps these children to grow spiritually, mentally and physically in accordance with the tenets of the Christian Science faith and hopefully to become responsible adults in tomorrow's society. In keeping with the Plaintiff's strong Christian Science influence over daily activities at the camp, supervised prayer or meditation sessions are conducted each day in addition to regular church services on Sunday.

11. Campers range in age from seven to sixteen. Many, but not all, campers return season after season; indeed, in some cases, the children are third or fourth generation campers.

12. The number of campers, their length of stay, average tuition and the like are shown on Exhibit 1 attached hereto and made a part hereof. This is the same Exhibit provided to Defendants in response to Interrogatory No. 29.

13. Payment of over $20,000 a year in real estate taxes serves to aggravate Plaintiff's annual operating deficit and, to a certain extent, precludes Plaintiff from retaining certain supplemental services for its campers, such as outside art and music consultants. Further, to some extent, the cost of the property taxes is passed along to campers in the form of increased tuition.

14. Plaintiff's camp is the only Christian Science summer camp in New England.

15. Not only has Plaintiff successfully recruited campers and charitable donations from states other than Maine, but Plaintiff advertises for campers in periodicals in states outside of Maine and sends its Executive Di-

rector annually on camper recruiting trips across the country.

16. I make this Affidavit to assist Plaintiff in its Motion for Summary Judgment in this pending action.

Dated: 4/2/93 By: /s/ Susan Smith
SUSAN SMITH

[Jurat Omitted in Printing]

EXHIBIT D
(Answer to Interrogatory No. 29)

Year	1989	1990	1991	1992
Camper Enrollment	271	234	239	248
Family Camp Enrollment	308	170	226	222
Regular Camp Capacity	400	400	400	400
Family Camp Capacity	300	300	300	300
% Maine Campers	4%	5%	4%	4%
Average Length of Stay:				
Regular Camp	4 weeks	4 weeks	4 weeks	4 weeks
Tuition/Fees	$370/wk	$408/wk	$425/wk	$445/wk

Note: Please note that with regard to enrollment and capacity, these figures are subject to minor adjustment to reflect the fact that some campers stay for the entire 7-week summer camp season while others attend for only 3 weeks or 4 weeks.

REPORT OF CONFERENCE OF COUNSEL
CV-92-658

D. *Stipulations*:

1. For each of the years in dispute (1989, 1990, 1991), Plaintiff owned the real property in question.
2. For each of the years in dispute (1989, 1990, 1991), Plaintiff was a Maine non-profit corporation.
3. For each of the years in dispute, more than 50% of Plaintiff's campers were non-residents.
4. For each of the years in dispute, Loon Echo Inland Trust, Inc. was a Maine non-profit corporation and a benevolent and charitable institution within the meaning of 36 M.R.S.A. § 652 (1)(A).
5. For each of the years in dispute, Plaintiff qualified as a § 501(c)(3) corporation under the Internal Revenue Code.
6. For each of the years in dispute, Plaintiff's average weekly charge for campers exceeded $30/ week.
7. For each of the years in dispute, Plaintiff successfully recruited campers as well as charitable donations from both Maine and other states.
8. For each of the years in dispute, there were benevolent and charitable institutions incorporated in Maine, which were not in fact conducted or operated principally for the benefit of persons who are not residents of Maine and which received property tax exemptions under 36 M.R.S.A. § 652(1)(A).
9. The N.E.T. and CMP easements on Plaintiff's property do not defeat Plaintiff's tax exempt status.

10. For each of the years in dispute, there were benevolent and charitable institutions incorporated in Maine which were in fact conducted or operated principally for the benefit of persons who are not residents of Maine and which denied property tax exemptions under 36 M.R.S.A. § 652(1)(A) because of such non-residents.
11. Plaintiff never requested a property tax exemption from the Town of Harrison prior to the letter of Glenn C. Johnson, dated April 15, 1992.
12. Plaintiff's request for a property tax abatement for 1990, based on a change in valuation attributable to a conservation easement, is presently pending before the Cumberland County Commissioners and all parties, including the County Commissioners, have agreed to stay that proceeding pending final disposition of this action.

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action Docket No. CV-92-658

CAMPS NEWFOUND/OWATONNA, INC.,
Plaintiff

v.

INHABITANTS OF THE TOWN OF HARRISON, *et als.*,
Defendants

PLAINTIFF'S RESPONSE TO DEFENDANTS' INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

NOW COMES Plaintiff, Camps Newfound/Owatonna, and responds to Defendants' Interrogatories and Request for Production of Documents as follows:

General Objection: Plaintiff objects to the definitions and instructions sections of the Interrogatories to the extent that Plainiff is expected strictly to comply with each and every definition and instructions in responding to each and every question on the grounds that to do so would be unreasonable and overly burdensome. Instead, Plaintiff will respond to the Interrogatories, as asked, making reference to the definitions if and as it appears necessary to understand the question.

1. Identify the person answering these Interrogatories.

ANSWER: Susan Smith, Chairman of Plaintiff's Board of Trustees, 581 Freehaven Drive, Montico, CA 93108.

2. Identify each and every person who to your knowledge has any knowledge of any of the facts concerning the subject matter of this case.

* * * *

(a) The discrepancy between the name of the corporation as stated in the Complaint and as stated in I.R.S. Publication 78;

(b) Why I.R.S. Publication 78 lists the entity as being of Salem, New York.

ANSWER:

(a) Plaintiff's correct name is Camps Newfound/Owatonna Corporation. Plaintiff will seek to amend its Complaint to correct the technical discrepancy.

(b) Salem, New York was the winter mailing address of the former general manager.

32. If the answer to Interrogatory 30 is "no," please explain why the Plaintiff is not listed in I.R.S. Publication 78.

ANSWER: *See* Response to Interrogatory 31 above.

33. Prior to the letter dated April 16, 1992 from Glen C. Johnson to Michael Thorne, Town Manager, did you ever assert to the Defendants that the statute challenged in this case is unconstitutional?

ANSWER: No.

34. Please explain in detail each and every way in which you are "burdened" by the statute challenged in this case, as alleged in the last sentence of paragraph 7 of the Complaint.

ANSWER: Plaintiff pays over $20,000 annually to Defendant Town in municipal real estate taxes because it is denied a tax exemption based upon the out-of-state residence of a majority of its campers. This cost is passed on to all campers, including the majority who reside out-of-state, and, in effect, to all individuals who make charitable contributions to Plaintiff, and so serves to increase the tuition burdening Plaintiff, camps and contributors in terms of the extra costs and Plaintiff's ability to continue to

function financially. In addition, Plaintiff's payment of annual real estate taxes to the Town restricts the programs which it can offer to its campers and even restricts those individuals who can afford to attend the camp based upon its tuition and operating costs.

35. Do you allege that the statute challenged in this case places you at a competitive disadvantage as to other summer camps and, if so, how?

ANSWER: Yes, *see* response to Interrogatory 34 above, by having to pay over $20,000 per year in real estate taxes Plaintiff is placed at a competitive disadvantage vis à vis other camps which are charitable and benevolent institutions as it must pass this cost along in the form of increased tuition.

36. Identify each and every Maine summer camp which, to your knowledge, is treated as tax exempt under the statute challenged in this case.

ANSWER: *See* Exhibit E attached.

37. Please state the bases for the allegation in paragraph 10 of the Complaint that Defendants' assessments have been "unreasonably high."

ANSWER: Absent the Defendants' wrongful refusals to grant a full abatement due to the illegality of the out-of-state restriction contained in 36 M.R.S.A. § 652, Plaintiff's property would be tax exempt. Further, the independent real estate appraiser retained by Plaintiff valued its real estate at approximately $575,000 based upon the term conservation easement imposed upon the property.

38. Please state the bases for the allegation in paragraph 11 of the Complaint that there has been a "substantial impairment of Plaintiff's right to engage in interstate commerce."

ANSWER: *See* response to Interrogatory 34 above. In addition, it is apparent from the face of

the statute that it is designed to discriminate against camps serving principally children from out-of-state.

39. Please explain in detail how you computed the "compensatory damages in the amount of $60,000.00 for the current year and the last three years in arrears of taxes paid, plus interest," as prayed for in Count II of the Complaint.

ANSWER: The actual amount is well in excess of $60,000.00. Plaintiff paid municipal real estate taxes to Defendant Town of Harrison in 1989 in the amount of $24,639.65; in 1990 in the amount of $21,618.49; and in 1991 in the amount of $20,770.71 (and an additional $994.70 for personal property taxes). In addition, Plaintiff has incurred attorney's fees and costs in pursuing this matter.

40. For each of the Plaintiff's fiscal years 1989, 1990 and 1991, what was the annual operating budget?

ANSWER: To Plaintiff, "annual operating budget" indicates a projection of revenues and expenses; however, this budget figure becomes meaningless in light of actual revenues and expenses. Approximate operating expenses are as follows:

1989	$550,000
1990	$470,000
1991	$490,000
1992	$535,000

Plaintiff also had capital expenses for each of those years as follows:

1989	$58,000
1990	$ 4,000
1991	$53,000
1992	$42,000

41. Identify all real property owned by you other than that located in Harrison, Maine.

ANSWER: None.

* * * *

EXHIBIT A

April 15, 1992

Mr. Michael Thorne, Town Manager
Town Hall
Main Street
P. O. Box 300
Harrison, Maine 04040

Dear Mr. Thorne,

This letter is a formal request for a tax refund and for a continuing exemption from future property taxes pursuant to 36 M.R.S.A. Section 652(1)(A). As you know, Camps Newfound/Owatonna Corporation is organized as a non-profit corporation under Maine law and conducts itself as a charitable and benevolent institution pursuant to the above noted statute. We have operated as such for many years on the same property in Harrison and have never been granted the tax exempt status to which we are entitled.

It is true that we have not been fortunate enough to draw the principal number of our children from the state of Maine and that on the face of subsection (1) of the statute we would not be entitled to the exemption for that reason. However, it is apparent that the subsection under which we have been denied an exemption is invalid and discriminatory and therefore in violation of the United States Constitution, Article I, section 8, clause 3 (the commerce clause), Article 4, section 2, clause 1 (the privileges and immunities clause), and the equal protection and due process clauses of the fourteenth amendment. See, for example, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

We request that you acknowledge our exemption and that you refund the taxes which we paid but did not owe for 1989, 1990, and 1991. Please contact us as soon as possible so that we can take the appropriate steps with regard to the upcoming abatement hearing. Granting our request and rightly acknowledging the invalidity of 36 M.R.S.A. Section 652(1)(A)(1) will render the abatement hearing moot and prevent us all from accumulating more legal fees. Should you deny our request, it may be best to postpone the abatement hearing on the 1990 taxes until a court of law can resolve the constitutionality of the discriminatory subsection.

Thank you for considering this most important request and for your forthcoming reply.

Sincerely,

TOWN OF HARRISON
Telephone 583-2241

May 6, 1992

Glenn C. Johnson, Chairman
Camps Newfound/Owatonna Corporation
RR2 Timberwood Place
South Salem, N.Y. 10590

RE: Refund and Exemption Request

Dear Mr. Johnson:

Following review of your request for a tax refund and exemption from property taxes, and review of the applicable Maine statute, the Board of Assessors have voted to deny your request. It is not the role nor duty of the Board of Assessors to pass judgement on or overrule a law of the State of Maine. Therefore, there can be no other action by the Assessors then to deny your request.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Michael J. Thorne
MICHAEL J. THORNE
Town Manager

MJT/b

cc: Board of Assessors
William L. Plouffe, Attorney for the Town

P.O. Box 300
(Intersection of Routes 35 & 117)
Harrison, Maine 04040

EXHIBIT E
(Other Tax Exempt Camps in Maine)

Camp Name	Location	Tax Exempt Status
Abnaki Day Camps	Brewer	100%
Camp Berwick	Harrington	Partial
Bishopswood	Hope	Partial
Blue Hill Society for Aid to Children	Sedgwick	100%
Capella	Lucerne-in-Maine (Dedham)	100%
Center Day Camp	N. Windham	100%
Camp Chewonki	Wiscasset	100%
China Lake Baptist Camp	China	100%
Camp Connor	Poland	100%
Friends Camp	China	100%
Camp Jordan	Ellsworth	100%
Kennebec Giri Scout Council Day Camps	Cape Elizabeth	100%
JCC Camp Kingswood, Inc.	Bridgton	Partial
Lawroweld	Weld	Partial
Maine State YMCA	Winthrop	100%
ME Conservation School	Woodstock	100%
Mast Landing Nature Day Camp	Falmouth	100%
Mechuana	Winthrop	100%
Camp Natarswi	T2 R9 (unorganized territory)	100%
Camp O-AT-KA	Sebago	Partial
Pilgrim Lodge	W. Gardiner	100%
Pondicherry	Bridgton	Partial

Camp Name	Location	Tax Exempt Status
Susan Curtis	E. Stoneham	100%
Tanglewood 4H Camp	Lincolnville	100%
Waban	Sanford	100%

(5)

No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF FOR THE PETITIONER

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Of Counsel

WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER
& HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

May 10, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

53 pp

QUESTION PRESENTED

Whether a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), violates the Commerce Clause because it deprives "benevolent and charitable" non-profit institutions of otherwise available property tax exemptions if they are "conducted or operated principally for the benefit of persons who are not residents of Maine."

LIST OF PARTIES

The Petitioner is Camps Newfound/Owatonna, Inc., a Maine Non-Profit Corporation. The Respondents are the Inhabitants of the Town of Harrison; Susan Searles, Michael Darcy, Paul Kilgore, Albert Haggerty and Robert Baker, as the Harrison Municipal Officers and Assessors; and Michael Thorne as the Harrison Town Collector.

STATEMENT PURSUANT TO RULE 29.1

Camps Newfound/Owatonna, Inc., a Maine Non-Profit Corporation, has neither parent nor subsidiary corporations.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTION:

TABLE OF AUTHORITIES—Continued

STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1988

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court (Pet. 1a-8a) is reported at 655 A.2d 876. The opinion of the Superior Court for Cumberland County (Pet. 9a-19a) is unreported.

JURISDICTION

The Supreme Judicial Court entered its judgment on March 7, 1995. The petition for a writ of certiorari was filed on June 2, 1995 and was granted on March 4, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 652(1)(A)(1) of Title 36 of the Maine Revised Statutes, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)

(1), is reprinted at Pet. 20a-21a. The challenged portion of the statute provides that property tax exemptions otherwise available to "benevolent and charitable" institutions are to be denied to any such institution that "is in fact conducted or operated principally for the benefit of persons who are not residents of Maine."

Article I, Section 8, Clause 3 of the United States Constitution provides that "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States," and Article VI provides that "This Constitution . . . shall be the supreme Law of the Land."

STATEMENT OF THE CASE

Petitioner challenges the constitutionality under the Commerce Clause of a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), that denies real estate tax exemptions to any otherwise qualified "benevolent and charitable" organization that "is in fact conducted or operated principally for the benefit of persons who are not residents of Maine." Petitioner is such an organization. Its challenge, while successful in the court of first instance, the Superior Court, was turned aside by the Maine Supreme Judicial Court (hereinafter referred to as the "Law Court" in accord with Maine practice).

Petitioner is a Maine-incorporated non-profit organization that has for many years operated a summer camp for Christian Science children in the Town of Harrison, respondent herein.[1] J.A. 38. Its purpose is to "help[] the children to grow spiritually, mentally and physically in accordance with the tenets of the Christian Science faith and thereby to become good citizens in society as

[1] The other respondents are the Town's assessors and its tax collector. Because of the unity of respondents' interests, we will refer to them collectively as "respondent." As we indicate below, the State is not a respondent.

adults." J.A. 40-41.[2] Accordingly, religious activities are a central component of the Camp's program. J.A. 41.

Petitioner, while the only Christian Science camp in New England, must recruit nationwide to secure adequate enrollment. During the tax years at issue, approximately 95% of petitioner's campers came from outside the state. J.A. 44.

Petitioner must also solicit contributions throughout the country in order to meet its operating expenses, which exceeded the income from its "modest endowment" and tuition revenue (about $400 a week per student) by about $175,000 a year during the three-year tax period in question. J.A. 41, 42, 51. Petitioner partly offset the cost of the tax—which averaged about $22,000 annually—by increasing tuition. That cost also to some extent diminished petitioner's ability to provide services. J.A. 42-43.

In these circumstances, and with other Maine camps benefiting from the exemption,[3] petitioner in 1992 requested of respondent a tax refund for the prior three years and a continuing exemption on the ground that § 652(1)(A)(1) was unconstitutional. J.A. 58-59. After respondent denied that request, petitioner brought suit. J.A. 36, 60.

The Superior Court granted summary judgment for petitioner, holding the statute incompatible with the "dormant" Commerce Clause. Viewing the provision as one "directly discriminat[ing] against interstate commerce," the court evaluated it under the "per se rule of

[2] The case was decided on summary judgment and there is no dispute as to material facts.

[3] The parties stipulated that "there were benevolent and charitable institutions" that principally served non-residents and therefore did not receive the exemption, and also that "there were [such] institutions" that did receive the exemption. J.A. 44-45.

invalidity" governing such statutes under this Court's rulings. Pet. 18a. In addition, the court: (1) found a sufficient impact on interstate commerce because of the character of the statute and the evidence of its effects (*id.* at 14a-17a & nn. 2 & 4); (2) held that it was immaterial whether the legislature's purpose was to aid resident campers rather than to harm non-resident campers (*id.* at 16a); and (3) ruled that, in any event, under the *per se* standard of review it was unnecessary to consider whether there were countervailing local interests (*id.* at 18a).

The Town—but not the State, which had intervened as a defendant in the Superior Court (J.A. 2)—appealed, and the Law Court reversed.[4] Pet. 4a-7a. The pivotal element in its decision was its determination that the statute, because it treated all Maine charities alike, was "evenhanded" rather than discriminatory, and that therefore the more "flexible" standard of review established by this Court respecting such statutes, rather than the *per se* test, controlled. *Id.* at 6a. In addition, pursuant to its precedent,[5] the Law Court imposed a "heavy burden of persuasion" on petitioner. *Id.* at 7a.

In light of this standard and petitioner's burden, the court ruled that (1) no tax discrimination issue was presented because "[t]he exemption statute does not impose a tax" (*id.* at 4a); (2) the purpose of the exemption, to "promote the public benefits" provided by charities, is legitimate (*id.* at 6a); (3) petitioner does not compete with camps that receive the exemption because it "is unique, serving a very limited segment of the population," *i.e.*, persons "who choose to attend camps because of the religious affiliation" (*id.* at 6a-7a); (4) "there is

[4] One member, Justice Lipez, did not participate. He had decided the case in the Superior Court prior to his elevation to the Law Court.

[5] *Maine Milk Producers, Inc.* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984).

no evidence that the exemption statute impedes interstate travel" (*id.* at 7a); and, finally, (5) the statute "bears no resemblance to the types of economic regulation that 'excite those jealousies and retaliatory measures the Constitution was designed to prevent' " (*id.* at 6a) (citation omitted).

Both the Superior Court and the Law Court rested their decisions upon this Court's decisions. The question is which court construed those decisions correctly.

SUMMARY OF ARGUMENT

The central question is whether Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1) discriminates "on its face" against interstate commerce and accordingly is to be judged by the "virtually *per se* rule of invalidity" applicable to such statutes, *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), or whether instead it "regulates evenhandedly," as the Maine Law Court held, and therefore is to be tested under the more flexible approach of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The reasons assigned by the Law Court are not sustainable, and no other grounds can be advanced to support either its choice of standards or its holding.

1. A statute whose very terms unequivocally disclose discrimination against interstate commerce is almost certainly invalid. The governing principles, set forth in *Philadelphia* v. *New Jersey* and a series of subsequent decisions, were summarized as follows in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992): Laws that "facially discriminate[]," which "are generally forbidden," are "typically struck down without further inquiry." "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." And "the burden falls on the State." There must be "some reason, apart from their origin, to treat [the articles of commerce] differently." A "more flexible approach" involving "lesser scrutiny" is "only available

where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade." *Id.* at 342-44.

2. Section 652(1)(A)(1) should be measured under these principles, for it discriminates against interstate commerce on its face. It denies real-estate tax exemptions to any otherwise qualified "benevolent and charitable" organization "that is in fact conducted or operated principally for the benefit of persons who are not residents of Maine." Thus, by the law's express terms, petitioner has been denied an exemption solely because too many of its campers come from other states. This is plainly discrimination, that is, "differential treatment," under dormant Commerce Clause doctrine. *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994).

And the provision burdens interstate commerce. The agreements between the petitioner and the non-resident campers are interstate transactions and their consummation requires interstate travel, which in turn constitutes interstate commerce. This Court so held in *Edwards* v. *California*, 314 U.S. 160 (1941), a decision invalidating a California statute making it a crime to transport an indigent into the state. That principle is confirmed also by *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 253-56 (1964), holding that Congress may, under the Commerce Clause, regulate public accommodations utilized in interstate travel because such travel is interstate commerce, considered together with such decisions as *Philadelphia* v. *New Jersey, supra*, affirming that the reach of the dormant Commerce Clause is coextensive with the power of Congress.

3. The grounds upon which the Law Court rested its opposite conclusion are contrary to this Court's decisions:

a. The Law Court held § 652(1)(A)(1) nondiscriminatory because it "does not favor in-state camps over

out-of-state competitors," but rather "treats all Maine charities alike." Pet. 5a-6a. Such a defense has been repeatedly rejected by this Court. Thus, in *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205 (1994), it was argued that there was no discrimination because the tax was imposed only on in-state dealers and applied to them equally. The Court responded that "[t]his argument, if accepted, would undermine almost every discriminatory tax case." "State taxes," the Court noted, "are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." 114 S. Ct. at 2216. See also, *e.g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 n.8 (1984); *I.M. Darnell & Son* v. *Memphis*, 208 U.S. 113, 117, 121 (1908).

b. The Law Court also thought a tax exemption, as opposed to a tax, not to be an instrumentality of discrimination. Pet. 4a. But this Court's decisions establish that an exemption is the Constitutional equivalent of a tax under the dormant Commerce Clause. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981) ("various tax credits and exclusions"); *Bacchus Imports*, 468 U.S. 263 (excise tax exemption); *I.M. Darnell*, 208 U.S. 113 (property tax exemption); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988) (sales tax credit).

4. The further grounds assigned by the Law Court for sustaining the statute are also not tenable:

a. While acknowledging that there was evidence that the cost of the tax was partly passed on by way of tuition increases, the Law Court found that "there is no evidence that the exemption statute impedes interstate travel." Pet. 7a. The Court reached this conclusion under a "flexible" standard of review coupled with imposition upon petitioner of a "heavy burden of persuasion" under a Maine precedent, *Maine Milk Producers, Inc.* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984). Pet. 6a-7a. But where, as here, the statute plainly discriminates, no fur-

ther showing is required under this Court's decisions. See, *e.g., Fulton Corp.* v. *Faulkner,* 116 S. Ct. 848, 855 n.3 (1996) ("[W]e have never recognized a *'de minimis'* defense to a charge of discriminatory taxation under the Commerce Clause."); *Maryland* v. *Louisiana,* 451 U.S. at 760 ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."); *Associated Indus. of Mo.* v. *Lohman,* 114 S. Ct. 1815, 1822 (1994) ("[A]ctual discrimination . . . is impermissible, and the magnitude and scope . . . have no bearing . . . .").

b. The Law Court's conclusion that, because of petitioner's Christian Science character, "nothing in the record suggests that [petitioner] *competes* with other summer camps" is irrelevant. Pet. 6a. *Edwards* v. *California, supra,* which did not involve competition, establishes that the question is simply whether there is discrimination against interstate commerce. Moreover, since other camps are open to Christian Science children, petitioner is in fact in competition. Finally, the statute is challenged on its face, and other organizations to which it applies are undeniably in competition.

c. Whether the statute's purpose was legitimate is immaterial (Pet. 6a), for it is well established in Commerce Clause cases that licit ends cannot redeem illicit means. *Philadelphia,* 437 U.S. at 626-27; *Chemical Waste Management,* 504 U.S. at 342-43. Many laws, accordingly, have been set aside as discriminatory despite unobjectionable goals.

5. Under either the *per se* or "more flexible" test, § 651(1)(A)(1) fails because there are nondiscriminatory alternatives that could have been employed to accomplish the purported objective of restricting the use of public monies to residents. Statutes unduly impacting interstate commerce, whether or not facially discriminatory, are not sustained in those circumstances. See, *e.g., Philadelphia,* 437 U.S. at 626-27 (facially discriminatory); *Dean*

Milk Co. v. *Madison,* 340 U.S. 349, 350 (1951) (facially neutral). Here, for example, vouchers could have been given to residents, or subsidies could have been provided to the establishments measured in some way by their service to residents. The requirement that reasonable alternatives be employed is especially apt where, as here, the legislative history casts doubt upon the asserted purpose and suggests that a desire to protect local enterprises and an animus against enterprises with non-resident roots played dominant roles.

6. Neither precedent nor policy supports the Law Court's evident belief that non-profit organizations and those they serve should not be accorded the protection that for-profit entities receive under the dormant Commerce Clause. Pet. 6a. The impact of a statute on interstate commerce is unaffected by whether the goal of the regulated organization is to make a profit or to serve the public. Indeed, *Edwards* v. *California* establishes that the Clause forbids discrimination against interstate transportation in the absence of any commercial element, much less a for-profit element.

7. The potential effects of a decision freeing states from the constraints of the dormant Commerce Clause argue strongly against such a holding. For example, the property of countless private colleges would be exposed to taxation. Moreover, the rationale of the decision would permit the withholding of state income tax deductions for contributions to non-profits not primarily serving residents. Except for the Maine statute, such restrictions are virtually without precedent. A fracturing of support for charities along state lines would be foreign to the nation's traditions and would predictably "excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc.* v. *Town of Clarkstown, N.Y.,* 114 S. Ct. 1677, 1682 (1994).

ARGUMENT

The statute in question, § 652(1)(A)(1), when tested against the dormant Commerce Clause as construed by this Court, is invalid. It incontestably discriminates on its face against interstate commerce, for it deprives Maine "benevolent and charitable" institutions of tax exemptions if they are conducted "principally for the benefit of persons who are not residents of Maine."[6] The provision, accordingly, must be judged under the rule, firmly established by this Court's decisions and invoked just last February, that "State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'" *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 854 (1996) (citation omitted). As we show, the reasons assigned by the Law Court for not applying the *per se* rule are contrary to this Court's decisions. Nor can any other exculpatory reasons be offered.

We begin with an examination of the evolution of the rules governing judicial review of statutes discriminatory on their face.

I. FACIALLY DISCRIMINATORY STATUTES ARE "VIRTUALLY *PER SE* INVALID."

While the rule that facially discriminatory state laws are "virtually *per se* invalid" has been framed in its present, uncompromising terms through a series of relatively recent decisions, it is rooted in the early, repeated, and consistent recognition by the Court that a principal role of the Constitutional provision designed to keep free the channels of interstate commerce must be to interdict laws of one state that discriminate against the commerce of another. As the Court has put it, "The prohibition against discriminatory treatment of interstate commerce follows

[6] The term "discrimination" in dormant Commerce Clause cases carries no overtones of invidiousness. It "simply means differential treatment." *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994).

inexorably from the basic purpose of the Clause." *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977). This prohibition, it seems safe to say, has for over 100 years been the irreducible core of this Court's dormant Commerce Clause jurisprudence.[7] Indeed, the Court itself has contrasted the constancy of its adherence to the nondiscrimination canon with the sometimes uncertain course of other aspects of its dormant Commerce Clause decisions.[8]

Over the past twenty-five years or so, that canon has been repeatedly considered by the Court, and the result has been both the reaffirmation of its central importance and significant explication respecting its proper application. It can fairly be said that the foundations of the modern analytical framework for adjudication of Com-

[7] That is, since at least *Guy* v. *Baltimore*, 100 U.S. 434, 439 (1880), where the Court declared that the Constitutional bar to discriminatory taxes "must be regarded as settled." For the development of dormant Commerce Clause jurisprudence from Chief Justice Marshall's *dictum* in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824), to *Guy*, see David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (1986), pp. 168-76, 222-36, 330-42, 403-16. Currie's view is typical: The "nondiscrimination principle has become a pillar of modern commerce-clause analysis." *Id.* at 405. See also, *e.g.*, Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 75 n.190 (1988).

[8] "This case-by-case approach has left 'much room for controversy and confusion . . . .' *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959). Nevertheless, . . . '[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned.' *Id.* at 458. Among these is the fundamental principle that . . . [n]o State . . . may 'impose a tax which discriminates against interstate commerce . . . .' *Ibid.*" *Boston Stock Exchange*, 429 U.S. at 329. See also *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205, 2220 (1994) (Scalia, J. concurring); *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525, 551 n.2 (1949) ("State legislation which patently discriminates against interstate commerce has long been held to conflict with the commerce clause itself.") (Black, J., dissenting).

merce Clause discrimination cases were laid in two opinions in the 1970's, one involving a statute that was discriminatory on its face, the other a statute that was not. And it is the distinction between these two types of statutes that is now an anchor of the anti-discrimination doctrine.

The first of these cases was *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). The Arizona statute in question required that all cantaloupes grown in the state be packed there. The law did not on its face discriminate against interstate commerce. That is, it applied to all fruit wherever sold and to all dealers wherever located. Nevertheless, the Court held that the provision impermissibly burdened interstate commerce, and in its opinion stated the "general rule" that has since been regularly invoked in judging legislation that, though neutral in terms, may unduly impact interstate commerce:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142 (citation omitted).

The second decision was *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), in which the Court held invalid a New Jersey statute prohibiting the importation of waste from other states—a facially discriminatory statute. In that decision, the Court for the first time, we believe, framed the standard governing review of such statutes in terms of "a virtually *per se* rule of invalidity," contrasting it with the "much more flexible approach . . . outlined in

Pike v. *Bruce Church, Inc.*," which applied where "there is no patent discrimination." 437 U.S. at 624.[9]

In a series of subsequent cases, the Court invoked, and elaborated upon, this *per se* rule. Thus, shortly after *Philadelphia*, the Court coupled that rule with a standard of "strictest scrutiny" respecting facially discriminatory statutes—there, a law prohibiting the commercial exportation of minnows to other states. *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). Then, in *Sporhase* v. *Nebraska*, 458 U.S. 941, 958 (1982), the Court cited *Hughes* in holding that an interstate reciprocity provision in a state statute did "not survive the 'strictest scrutiny' reserved for facially discriminatory legislation." [10]

Two 1984 decisions applied the same rule with the same result—invalidation of facially discriminatory laws: *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 268 (the law "seems clearly to discriminate on its face against interstate commerce"); and *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406-07 (the statute was "on its face . . . designed to have discriminatory economic effects").[11]

---

[9] Chief Justice, then Justice, Rehnquist dissented in *Philadelphia*, as he has in the subsequent waste disposal cases discussed below, because of the health and safety issues raised there. We discuss later the relevance of the absence of police power issues in the case at bar. See *infra* pp. 28-29.

[10] Other features of the regulation were not facially discriminatory and were not invalidated. See discussion of *Sporhase* in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 363-66 (1992).

[11] There are several other 1980's decisions in which the Court held plainly discriminatory laws to be invalid, but we do not discuss them in the text because the Court did not expressly characterize the laws as discriminatory on their face. See *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982); *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 100 (1984); and *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

In the 1990's, the Court has applied the *per se*/strictest scrutiny rule in half a dozen cases, one of which, *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992), comprehensively cataloged the principal precedents. There the Court set aside a state law that imposed a fee on the disposal of hazardous waste generated outside, but not upon waste generated within, the state. Taxes that "facially discriminate[]" against interstate commerce, the Court declared, "are generally forbidden" and are "typically struck down without further inquiry." 504 U.S. at 342.[12] " 'At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.' " *Id.* at 342-43.[13] And "the burden falls on the State." *Id.* at 342.[14] There must be " 'some reason, apart from their origin, to treat [the articles of commerce] differently.' " *Id.* at 344.[15] While the Court has applied a "more flexible approach" involving "lesser scrutiny" in certain cases, that test is "only available 'where . . . there is *no* patent discrimination against interstate trade.' " *Id.* at 343 n.5.[16]

---

[12] Citing *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984); *Walling* v. *Michigan*, 116 U.S. 446, 455 (1886); *Guy* v. *Baltimore*, 100 U.S. 434 (1880); *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 406-07 (1984); *Maryland* v. *Louisiana*, 451 U.S. 725, 759-60 (1981); and *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336-37 (1977).

[13] Quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979).

[14] Citing *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, [504 U.S. 353, 363-66] (1992); and *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278-79 (1988).

[15] Quoting *Philadelphia* v. *New Jersey*, 437 U.S. at 626-27; citing also *New Energy Co.*, 486 U.S. at 279-80.

[16] Quoting *Philadelphia*, 437 U.S. at 624; citing also *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986), and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Chemical Waste Management had been preceded by a similar case in which the Court invalidated a county (rather than a state) ban on importation of waste as discriminatory on its face. *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992). And it was followed by a decision turning aside Oregon's effort to stem waste importation by a fee rather than by an outright ban. *Oregon Waste Sys.* v. *Department of Envtl. Quality*, 114 S. Ct. 1345 (1994). The *Oregon Waste Systems* opinion, again summarizing the principal criteria, concluded that the "virtually *per se*" rule and the "strictest scrutiny" test together imposed a "burden of justification [that] is so heavy that 'facial discrimination by itself may be a fatal defect.' " 114 S. Ct. at 1351 (citation omitted). Finally, in somewhat more complicated circumstances that divided the Court as to the question whether the regulation was facially discriminatory, a waste processing ordinance was set aside on the basis of the *per se* test in *C & A Carbone, Inc.* v. *Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994).

This series of post-*Philadelphia* decisions closed with two cases in which the Court unanimously set aside state taxes and reaffirmed the guiding precepts respecting facially discriminatory statutes. As in *Fulton Corp.*, discussed *supra* at 10, the Court in *Associated Industries of Missouri* v. *Lohman*, 114 S. Ct. 1815, 1820 (1994), declared: "[W]e . . . have applied a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade" (citation omitted).

We turn now to the question whether there is any basis for the Law Court's conclusion that the statute at issue does not facially discriminate .

II. SECTION 652(1)(A)(1) FACIALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE.

The Maine statute in issue facially discriminates against interstate commerce because in terms it denies a tax

exemption to Maine charities if they provide services in Maine to too many persons who reside in other states. A predictable result is that the interstate agreements that underlie, and the interstate travel connected with, such provision of services will be deterred. And that deterrence constitutes the violation. See, *e.g.*, *Boston Stock Exchange*, 429 U.S. at 334 n.13 (even if the tax does not itself cause traders to use out-of-state exchanges, it "is an inhibiting force," and "that inhibition is an unconstitutional barrier to the free flow of commerce").[17]

Most obviously, perhaps, the statute provides a strong incentive for charities to limit the number of out-of-state residents they serve so as not to lose the exemption. Alternatively, they may seek to offset the additional costs of serving non-residents by increasing their charges to them, thereby discouraging their patronage. If they take neither course, their added expenses will likely result either in an overall increase in their charges or in a

[17] Respondent has argued that the statute does not discriminate against interstate commerce because an exemption could be lost without interstate travel in the following hypothetical situation: "[A] Maine non-profit could operate from facilities in Maine, *e.g.*, a headquarters building, but deliver its charity primarily outside Maine." Br. Opp. 17. Surely a statute should not be tested by such a fanciful construct. Respondent argues, in effect, that the standard of review should be controlled by an application of the statute that is imagined and doubtless was not contemplated by the legislature, instead of by the application that is real and intended.

We perhaps should add that, were the hypothetical proposed by respondent actually presented, we would not agree that the absence of interstate travel matters. That is, in our view a law penalizing, solely because of residency, transactions between citizens of different states for the provision of services would, by virtue of that distinction alone, facially discriminate against interstate commerce. Neither interstate transportation of goods nor of persons is necessary to a dormant Commerce Clause violation. See *Boston Stock Exchange, supra; Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

diminution in services or both. Whatever the precise form of the effects, the result will be that the charities serving too many non-residents, and those non-residents, will be disadvantaged in comparison to institutions serving primarily residents. The effects are of the same character as those that would be produced if the state were to impose a quota system or mandate higher non-resident charges. Put differently, the effects are precisely the same as those produced by a tax on transactions with non-residents, because that is in substance what the state has done.

In combination, these circumstances constitute a paradigmatic facial discrimination against interstate commerce. The Law Court erred in ruling otherwise, as we now demonstrate.

A. The Law Court's Erroneous Choice of Standard of Review.

As we have noted, § 652(1)(A)(1) escaped the "strictest scrutiny" under the "virtually *per se* invalid" rule because the Law Court concluded that it did not discriminate on its face. This view of the statute, so unlikely in terms of a common sense reading, was wrong as well in terms of the teaching of this Court's decisions.

The reason assigned by the Law Court for its view that § 652(1)(A)(1) does not discriminate against interstate commerce is that it "does not favor in-state camps over out-of-state competitors." Rather, "[t]he exemption statute treats all Maine charities alike. They all have the opportunity to qualify for an exemption by choosing to dispense the majority of their charity locally." Pet. 5a-6a.

This Court has expressly foreclosed this defense. It is typical for an unconstitutional tax to be levied against in-state, rather than out-of-state, subjects, since they are handy. Thus, in *West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205 (1994), the Court rejected the very argument accepted here by the Law Court—that the tax did not discriminate against interstate commerce because it

was imposed only on in-state persons and applied to them equally. As the Court pointed out, "This argument, if accepted, would undermine almost every discriminatory tax case." "State taxes," the Court concluded, "are ordinarily paid by in-state businesses and consumers, yet if they discriminate against out-of-state products, they are unconstitutional." *Id.* at 2216.

The Court relied upon identical reasoning in *Bacchus Imports*. There the Court summarily dismissed the notion that there was no discrimination because the in-state taxpayers were all treated alike:

> "The State does not seriously defend the Hawaii Supreme Court's conclusion that because there was no discrimination between in-state and out-of-state *taxpayers* there was no Commerce Clause violation. Our cases make clear that discrimination between in-state and out-of-state goods is as offensive to the Commerce Clause as discrimination between in-state and out-of-state taxpayers." 468 U.S. at 268 n.8.

The decision cited in *Bacchus* as a leading precedent, *I.M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908), is especially instructive. Relying upon even earlier precedents, it underscores how long and firmly established is the rule that the Law Court disregarded here. Darnell operated a lumber mill and was taxed on logs it brought in from out-of-state, while timber cut within the state was exempt. The exemption applied to all property owners alike, and the state "asserted that, as the plaintiff company was a citizen of Tennessee, it could not be heard to complain." 208 U.S. at 117. The Court held the tax invalid as discriminatory, quoting *Guy* v. *Baltimore*, 100 U.S. 434, 439 (1880), for the proposition that:

> " '[N]o State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, *or upon citizens because engaged in the sale therein, or the transportation thereto*, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.' " 208 U.S. at 121 (emphasis supplied).[18]

In short, this liminal choice between a strict and a more forgiving standard was wrongly made by the Law Court. And that choice was critical. Under the *per se* rule "[t]he State's burden of justification is so heavy that 'facial discrimination by itself may be a fatal defect.' "[19] But under the "flexible" standard employed by the Law Court, construed in light of its precedent,[20] a "heavy burden of persuasion" was imposed upon petitioner. A prime example of the consequences of this election of standards was the court's conclusion that the evidence did not establish that the statute burdened interstate commerce, a determination we address next.

B. The Statute's Adverse Impact on Interstate Commerce.

In considering the impact of § 652(1)(A)(1) on interstate commerce, the Superior Court properly focused upon the statute's relationship to interstate travel, since such travel is necessarily associated with the services provided to non-residents by the organizations covered by the law. Pet. 14a n.2. That is, those organizations furnish services at their Maine facilities, to which their nonresident patrons travel from their states. Thus, the nature of the interstate commerce involved is the same as that associated with the operation of a hotel, a college, or any other service organization with an interstate service area.

---

[18] For other cases in which the burden of the unconstitutional regulation fell "equally" upon all in-state entities, see, *e.g.*, *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361; *Oregon Waste Systems*, 114 S. Ct. at 1348; *C & A Carbone*, 114 S. Ct. at 1681.

[19] *Oregon Waste Systems*, 114 S. Ct. at 1351, quoting *Hughes*, 441 U.S. at 337.

[20] *Maine Milk Producers, Inc.* v. *Commissioner*, 483 A.2d 1213, 1218 (Me. 1984).

A hotel could not, consistent with the dormant Commerce Clause, be penalized for "importing" non-resident guests on the theory that interstate commerce is not involved, any more than a lumber mill can be penalized for importing lumber, see *I.M. Darnell, supra.* So, too, it cannot be argued that the interstate travel necessarily associated with petitioner's service of non-residents is unprotected. For it is established that the dormant Commerce Clause protects interstate travel just as it does interstate transportation of lumber. The leading case is *Edwards* v. *California*, 314 U.S. 160 (1941), where the Court set aside as incompatible with the Commerce Clause a Depression-era California statute making it a misdemeanor for anyone to bring into the state an "indigent person who is not a resident." *Id.* at 171. The Court declared that "it is settled beyond question that the transportation of persons is 'commerce' within the meaning of that provision [the Commerce Clause]," [21] and also that "[i]t is immaterial whether or not the transportation is commercial in character." [22] *Id.* at 172.

Under *Edwards*, the travel associated with the provision of services by petitioner and the other charities covered by the statute is *a fortiori* interstate commerce, since it *is* commercial in character. That is, as in the case of hotels and like enterprises, there is an agreement, formal or informal, generally for consideration, with the non-resident to provide a camping program, or nursing home care, or boarding facilities.

---

[21] Citing: "*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 203; *Leisy* v. *Hardin*, 135 U.S. 100, 112; *Covington Bridge Co.* v. *Kentucky*, 154 U.S. 204, 218; *Hoke* v. *United States*, 227 U.S. 308, 320; *Caminetti* v. *United States*, 242 U.S. 470, 491; *United States* v. *Hill*, 248 U.S. 420, 423; *Mitchell* v. *United States*, 313 U.S. 80. Cf. The Federal Kidnaping Act of 1932, U.S.C., Title 18, §§ 408a-408c." *Edwards*, 314 U.S. at 172 n.1.

[22] Citing *Caminetti, supra* note 21 (noncommercial interstate transportation for immoral purposes).

Given this relationship between the charities providing the service and the non-residents served, the reliance by the Superior Court upon *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), was especially apt. Pet. 14a n.2. There, in sustaining federal civil rights accommodations legislation, the Court traced back to the *Passenger Cases*, 48 U.S. (7 How.) 283, 401 (1849), the principle that interstate commerce "include[s] the movement of persons through more States than one." 379 U.S. at 255-56. When that holding respecting the extent of Congress' power is coupled with the complementary well-established principle that the reach of the dormant Commerce Clause is coextensive with the reach of Congressional authority,[23] the correctness of the Superior Court's holding respecting the relationship of § 652(1)(A)(1) to interstate commerce is evident.[24]

The Law Court, however, disagreed, holding that there was insufficient proof that the statute did in fact impose a burden upon interstate commerce: "[A]lthough the record suggests that the denial of a tax exemption results in increased costs that are passed along 'to some extent' to the campers in the form of increased tuition, there is no evidence that the exemption statute impedes interstate

---

[23] "The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes*, 441 U.S. at 326 n.2, citing *Philadelphia*, 437 U.S. at 621-23 (rejecting a "two-tiered definition of commerce"). See also *BT Investment Managers*, 447 U.S. at 39; *Fort Gratiot Sanitary Landfill*, 504 U.S. at 359 n.3.

[24] The consequence of this unitary concept of interstate commerce under both aspects of the Commerce Clause is not, of course, that a state law affecting interstate travel in any way is invalid, as respondent has suggested in urging that the Superior Court erred in relying upon *Heart of Atlanta Motel*. Br. Opp. 11-12. Otherwise states would be barred from countless other actions affecting countless aspects of interstate commerce even where Congress is silent. It is only state legislation that improperly bears upon interstate commerce that is foreclosed.

travel." Pet. 7a. And, as we have noted, the court demanded a good deal in that respect because of its cardinal ruling respecting the appropriate standard of review—"flexible"—and the placement of the burden of proof—on petitioner—and the degree of that burden—"heavy."

But nothing remotely approaching such a demonstration is called for by this Court's decisions. Rather, it is enough to show that the tax is real and that it discriminates against interstate commerce, as the Superior Court held. Noting that the "inescapabl[e]" consequence of the statute is "to make the cost of providing services to out-of-state residents more expensive," the court concluded that under this Court's rulings that was enough:

> "In *Maryland* v. *Louisiana*, the Court refused to allow for more evidence concerning the extent of the discrimination: 'We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' 451 U.S. at 760. It follows from this assertion that the fact of discrimination against interstate commerce, rather than its extent, is the primary consideration. . . ." Pet. 17a.

This issue was addressed most recently in *Fulton Corp.*:

> "Although the Secretary does suggest that the tax is so small in amount as to have no practical impact at all, we have never recognized a '*de minimis*' defense to a charge of discriminatory taxation under the Commerce Clause. See, *e.g.*, *Associated Industries of Mo.* v. *Lohman*, —— U.S. ——, ——, 114 S. Ct. 1815, 1822, 128 L. Ed. 2d 639 (1994) ('[A]ctual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred[.]'); *Maryland* v. *Louisiana*, 451 U.S. 725, 760, 101 S. Ct. 2114, 2135, 68 L. Ed. 2d 576 (1981)." 116 S. Ct. at 855 n.3.[25]

[25] See also *Pike*, 397 U.S. at 145 ("The nature of that burden is, constitutionally, more significant than its extent."); *Boston Stock Exchange*, 429 U.S. at 334 n.13.

In the case at bar, "actual discrimination" is evident from the face of the statute, its enforcement, and the likely consequences that we have outlined above.

C. Tax Exemption as a Means of Discrimination.

The Law Court appeared to regard the form of § 652 (1)(A)(1) as a saving feature. Thus:

> "Tax exemptions are characterized in Maine's tax statutes as 'tax expenditures' . . . . The exemption statute does not impose a tax; it exempts nonprofit corporations that choose to meet certain standards from a tax that all other taxpayers must pay." Pet. 4a.

But it is well established that denial of a tax exemption is not only the functional, but also the Constitutional, equivalent of imposition of a tax for purposes of the dormant Commerce Clause. This principle was established as long ago as 1908 in *I.M. Darnell*, 208 U.S. at 125, which involved a property tax exemption. That rule has been followed with regularity. See *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981) ("[T]he Louisiana First-Use Tax unquestionably discriminates against interstate commerce . . . as the necessary result of various tax credits and exclusions."); *Bacchus Imports*, 468 U.S. 263 (excise tax exemptions); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988) (sales tax credit); *Westinghouse*, 466 U.S. at 399-400 & n.9.[26]

There is one final defense raised by respondent, though not by the Law Court, based on the form of the provision: That it is distinguishable from a tax because it is not only an exemption, but an exemption from a *property*

[26] In *West Lynn Creamery*, Justice Scalia, in concurring, noted that exemptions and credits are "no different in principle" from tax laws that "facially discriminate" and have "likewise been held invalid." 114 S. Ct. at 2220.

tax.[27] But surely it cannot matter whether the vehicle for imposing the burden is a property tax or some other sort of tax, any more than it matters whether it is a credit or an exemption. The impact on interstate commerce is the same no matter the form. At any rate, and not surprisingly, the argument is foreclosed by precedent. As we have already noted the statute struck down in *I.M. Darnell*, 208 U.S. at 115, was a property tax exemption.

III. SECTION 652(1)(A)(1) IS UNCONSTITUTIONAL WHEN TESTED UNDER THE *PER SE* RULE.

To be sure, to say that a statute should be subjected to "the strictest scrutiny" because it is of a type that is "virtually *per se*" unconstitutional and that is "typically struck down without further inquiry," while signaling an almost certain outcome, does not absolutely foreclose a different one. And, indeed, this Court has upheld a facially discriminatory statute in one—but only one—recent case, *Maine* v. *Taylor*, 477 U.S. 131 (1986). We now examine *Taylor* and related cases in terms of what issues may be left for consideration once it is determined that a law is discriminatory on its face. As we show, under this precedent there is no warrant for exempting § 652(1)(A)(1) from the rule of invalidity.

A. The Police Power Cases and the "Nondiscriminatory Alternative" Test.

Perhaps the principal source of tension under the dormant Commerce Clause between local and federal inter-

[27] Respondent asserted that "[m]unicipal property tax exemptions are also different from excise and sales tax exemptions" because "the non-exempt property taxpayers must 'make up for' the dollars lost as a result of the exemption," whereas "if a product is exempted from an excise tax or a sales tax . . . there is no automatic shifting of taxes to other products and their consumers." Br. Opp. 9-10. If this is a distinction, it makes no difference. Automatic or not, if one person is exempt someone else pays.

ests has been attempts by the states to exercise their police power in ways that have arguably discriminated against interstate commerce. The Court has always acknowledged the legitimacy of the states' interest in securing the health and safety of their citizens, as well as in conserving their natural resources, and early decisions upheld what would now be termed facially discriminatory laws barring the importation of articles such as "unhealthy swine or cattle . . . or decayed or noxious foods" on the theory that the offending materials were simply not articles of commerce within the meaning of the Commerce Clause.[28]

But here again *Philadelphia* v. *New Jersey* marked an important doctrinal shift. There the Court held that "all objects of interstate trade merit Commerce Clause protection," and explained the quarantine decisions on the ground that the articles "required destruction as soon as possible because their very movement risked contagion and other evils." 437 U.S. at 622, 628-29.[29] See also, *e.g.*, *Chemical Waste Management*, 504 U.S. at 346-48. Applying, then, the *per se* test to the facially discriminatory waste importation ban at issue, the Court in *Philadelphia* concluded that it should be set aside because of that discrimination coupled with the consideration that the environmental hazards associated with waste could be alleviated by a nondiscriminatory alternative, one that would bear equally upon waste generated both inside

[28] See *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935) and cases there cited. This rationale took form as early as *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) at 203.

[29] This approach had historical credentials. It had been foreshadowed fifty years after *Gibbons* by *Henderson* v. *Mayor of New York*, 92 U.S. 259, 271-72 (1876) ("Nothing is gained in the argument by calling it the police power. . . . [W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void. . . .").

and outside the state.[30] Accordingly, the importation ban fell.

It is this doctrine respecting the availability of nondiscriminatory alternatives to facially discriminatory statutes that has been of controlling importance in the post-*Philadelphia* waste disposal cases discussed above and that is, as we will show, of special relevance here. Thus, in *Fort Gratiot Sanitary Landfill*, 504 U.S. at 366, the Court held that the state had not met "the burden of proving that [the regulations] further health and safety concerns that cannot be adequately served by nondiscriminatory alternatives." And in *Chemical Waste Management*, 504 U.S. at 344-45, the Court stressed that "[l]ess discriminatory alternatives . . . are available to alleviate this concern. . . ." A like consideration was the basis for the final decision in this series, *C & A Carbone*, 114 S. Ct. at 1638: The town "has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question."

This same adjudicatory principle has been followed in cases involving another state interest the Court has recognized as substantial, the conservation of natural resources. Here, too, facially discriminatory statutes have been held invalid where nondiscriminatory alternatives were available. See *Hughes*, 441 U.S. at 338 ("[N]ondiscriminatory alternatives would seem likely to fulfill the State's purported legitimate local purpose [of fish conservation] more effectively.");[31] *Sporhase*, 458 U.S. at 957-58 (the

[30] "And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626.

[31] *Hughes* overruled a decision based on a rationale analogous to the quarantine cases, *Greer* v. *Connecticut*, 161 U.S. 519 (1896) (wild game not articles of commerce).

water regulation "is not narrowly tailored to serve" the asserted conservation purpose).

Since health, safety, and conservation needs can almost always be addressed by facially neutral measures, it is not surprising that, under modern dormant Commerce Clause jurisprudence,[32] there has been but one facially discriminatory enactment that has been upheld so far as we are aware—the law sustained in *Maine* v. *Taylor*.

In *Taylor*, the statute in question explicitly barred the importation of live baitfish from out-of-state and therefore was "subject to the strict requirements of *Hughes* v. *Oklahoma*." 477 U.S. at 138. But the law was sustained on the basis of a trial court finding that no other method would adequately protect against infestation of the native fish population. Thus, the statute "satisfie[d] the requirements ordinarily applied . . . to local regulation that discriminates against interstate trade: the statute must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means." *Id.* at 140. As the Court later explained *Taylor*:

> "Maine there demonstrated that the out-of-state baitfish were subject to parasites foreign to in-state baitfish. This difference posed a threat to the State's natural resources, and absent a less discriminatory means of protecting the environment—and none was available—the importation of baitfish could properly be banned." *Chemical Waste Management*, 504 U.S. at 348.

This single ratification of a facially discriminatory statute, both in its uniqueness and its rationale, undermines rather than supports the decision below, as we now show.

[32] That is, putting aside the pre-*Philadelphia* cases discussed above. This is not to say that the outcome might not be the same in some of those cases; but under *Philadelphia* and its progeny the statutes would have to meet the "no available alternative" test.

B. Section 652(1)(A)(1) and the "Nondiscriminatory Alternative" Test.

In light of these precedents, if the invalidity of § 652 (1)(A)(1) is not established by its unambiguous discrimination alone, the question of the availability of nondiscriminatory alternatives would have to be considered. Before we do so, however, we describe why this statute is infirm whether or not alternatives were at hand.

1. *The unconstitutionality of § 652(1)(A)(1) irrespective of available alternatives.* While *Taylor* establishes that a facially discriminatory statute *may* be valid if the state had no reasonably available alternatives for dealing with a significant problem, it does not stand for the proposition that a statute is *always* valid in such circumstances. The Court stated no such rule in *Taylor,* and there are contrary indications in other decisions. Thus, the Court has said that "facial discrimination *by itself may be a fatal defect,*" [33] and that such discrimination *"at a minimum* . . . invokes the strictest scrutiny . . . of the absence of nondiscriminatory alternatives." [34] And in contrast to *Taylor* stand several decisions discussed in the opening part of this brief in which plainly discriminatory laws were held invalid without consideration of the question of alternatives.[35]

Given these decisions, together with the Court's near categorical phrasing of the standard and the almost unbroken line of decisions striking down facially discriminatory statutes, it would seem, at a minimum, that the non-

---

[33] *Hughes*, 441 U.S. at 337 (emphasis supplied), quoted in *Oregon Waste Systems*, 114 S. Ct. at 1351.

[34] *Chemical Waste Management*, 504 U.S. at 342-43 (emphasis supplied) (quoting *Hughes*, 441 U.S. at 337).

[35] *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848 (1996); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *Westinghouse Electric Corp.* v. *Tully*, 466 U.S. 388, 406-07 (1984); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977); *Maryland* v. *Louisiana*, 451 U.S. 725 (1981); and *Brown-Forman Distillers* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986).

availability of alternatives would not always save such a statute. Presumably the result should turn in part upon the importance of the state's interest. The state's interest in foreclosing non-residents from benefiting from charitable tax exemptions scarcely stands on the same footing as the interest of the state in protecting its fisheries from contamination or in any of the other police power or natural resource measures discussed in the cases we have listed.[36] In these circumstances, the plain and purposeful discrimination reflected in § 652(1)(A)(1) should condemn the statute without more.

However, the Court need not reach the question whether § 652(1)(A)(1) would be valid in the absence of legislative alternatives, for such alternatives did, and do now, exist. Before describing some of those options, we note the relevance of this question under both the *per se* and the "flexible" standards of review.

2. *The relevance of the "nondiscriminatory alternative" test to both facially discriminatory and facially neutral statutes.* While the Superior Court found that there were nondiscriminatory alternatives to § 652(1)(A)(1) (Pet. 19a), the Law Court did not even mention the issue, even though this Court's decisions have made clear that the question of alternatives is an integral component of the "flexible" standard as well as of the *per se* rule.[37] Thus, as we have noted, under *Pike* an important question is whether the "legitimate local purpose . . . could be

---

[36] As in *Pike*, 397 U.S. at 143, "We are not, then, dealing here with 'state legislation in the field of safety' . . . or with an Act designed to protect consumers . . . from contaminated or unfit goods." (footnote omitted).

[37] Nor has respondent at any point argued that no nondiscriminatory alternatives were available. Curiously, the Law Court cited only decisions involving facially discriminatory statutes, not any involving facially neutral statutes: *Brown-Forman Distillers, Associated Industries of Missouri, C & A Carbone, Chemical Waste Management,* and *Oregon Waste Systems.*

promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.[38]

Therefore, our discusion below as to the availability of alternatives pertains even were the *Pike* standard of review appropriate. We note, moreover, that under that standard neither this issue nor any other should have been examined pursuant to the "heavy burden of persuasion" invoked by the Law Court. That rule finds no support in any decision of this Court. On the contrary, where there is good reason to find a discriminatory burden on interstate commerce, even as to a facially neutral statute "the burden falls on the State to justify it both in terms of the local benefits . . . and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977), and cases cited.

3. *Available nondiscriminatory alternatives.* Withholding exemptions from charities that serve too many nonresidents was by no means the only way that the state could have secured its purported interest in directing public financial support to the benefit of residents alone. "Reasonable and adequate alternatives" were, and are, available.[39] The tax exemptions, for example, could be replaced with vouchers to residents for use at licensed

[38] *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951), is another leading precedent. There the Court overturned a city ordinance that, though evenhanded in terms, as a practical matter erected a barrier to the interstate importation of milk. This, the Court held, the city "cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available. . . ." *Id.* at 354. See also *BT Investment Managers*, 447 U.S. at 43; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 376-78 (1976).

[39] We take the "reasonable and adequate alternatives" phrase from *Dean Milk Co.*, 340 U.S. at 354.

camps, nursing homes, or other covered establishments. Or payments could be made directly to the institutions to defray residents' fees. There could be no constitutional objection to such measures, any more than to granting scholarships to residents. Interstate commerce would not be affected, since charities would not be penalized for serving non-residents. And these alternatives would be more than "adequate," since financial support would be limited to residents, whereas under § 652 (1)(A)(1) benefits also flow to non-residents who are served by charities that are devoted primarily to residents.

To be sure, costs would be increased for those organizations now receiving an exemption; but, to the extent they serve residents, so would the effective economic demand for their services and, correspondingly, their ability to increase charges. There is surely no indication that these organizations would founder under such a regime. Moreover, it is likely that an additional alternative—the provision of subsidies to charitable institutions related in some way to their service to residents—would also be constitutionally permissible.[40] Such a measure

[40] While the Court has not spoken unequivocally to the question of subsidies under the dormant Commerce Clause, see *West Lynn Creamery*, 114 S. Ct. at 2214 n.15, it appears likely that such measures would, generally at least, be approved. See *New Energy Co.*, 486 U.S. at 278 ("Direct subsidization of domestic industry does not ordinarily run afoul" of the dormant Commerce Clause.); *West Lynn Creamery*, 114 U.S. at 2220 (Justice Scalia, concurring) ("[A]pplication of a state subsidy from general revenues is . . . far removed from what we have hitherto held to be unconstitutional . . . . Indeed, in my view [we] have already approved the use of such subsidies. See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 809-810 . . . (1976)."); *Alexandria Scrap*, 426 U.S. at 815 (Justice Stevens, concurring); *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 447 n.1 (1980) (Justice Powell, dissenting). For discussions of the reasons for distinguishing subsidies from taxes under the dormant Commerce Clause, including the consideration that since subsidies require conscious deliberation they are likely to be carefully considered and not to proliferate, see Mark P. Gergen, *The Selfish State and the Market*, 66 Tex. L. Rev. 1097,

would certainly have a "lesser impact on interstate activities" than Section 652(1)(A)(1),[41] since an organization would not lose all fiscal support unless it served "primarily" residents, but rather would benefit from the provision of services to whatever complement of residents it did serve.

IV. THE DORMANT COMMERCE CLAUSE SHOULD APPLY FULLY TO CHARITIES.

For the reasons we have given, a statute like § 652(1)(A)(1) directed at ordinary commercial enterprises would unquestionably be invalid. There would be no defense, for example, for a law that, in order to discourage an overflow of tourists without penalizing residents, exempted from an accommodations tax those hotels serving principally residents. The Law Court's opinion, however, as well as respondent's arguments (Br. Opp. 8-9), reflect the conviction that differential taxation of charities should be judged by special, and especially liberal, criteria. But, for reasons we outline below, there is no warrant in precedent or policy for a ruling that would open non-profit organizations to discrimination from which for-profit businesses would be immune. It is the character of the interstate commerce involved and the impact upon it that is the key, not the nature of one or another participant in the chain of transactions.

A. The Nature of the Proposed Special Rule for Charities.

It is plain enough that the Law Court thought the charitable status of those subject to the statute was sig-

1134-35 (1988); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 544 (1981); and Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1194-95 (1986).

[41] *Pike*, 397 U.S. at 142.

nificant, though it is not so plain why or how. The most pertinent passage in its opinion is this:

> "The purpose of any tax exemption for charitable institutions is to relieve the charity from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide. This is a legitimate state interest." Pet. 6a.

This unquestionably correct generalization, however, does not relate to the issue, which is the legitimacy, not of the tax exemption, but of the state's decision to make it unavailable to charities that serve too many non-residents. Nevertheless, respondent thinks that in this passage the Law Court "explicitly recognized" the "key importance" of the difference between "[t]he purpose and effect of tax exemptions for non-profit *vis-a-vis* for-profit organizations" (Br. Opp. 9). We concur in this reading of the court's opinion, partly because of the transparent infirmity of the other grounds the court assigned. One is entitled to wonder, for example, whether the court would have sanctioned a statute exempting from property taxes Maine mills if, but only if, they produced lumber primarily from trees grown in Maine, on the grounds that all Maine mills were treated alike, or that a tax exemption was not the Constitutional equivalent of a tax. See *I.M. Darnell, supra.*

The further question is precisely what the result of this purported special status of charities might be. In this case, the result was the application of the rule pertaining to facially neutral statutes. But the statute is in fact facially discriminatory. It seems clear enough, then, that under the Law Court's approach the *per se* test will never be applicable in cases involving charities no matter how palpably discriminatory the statute may be.

Nor for that matter, as we see it, does that approach permit the overturning of such a statute even under the *Pike* test. If the issue is to be resolved by a balancing of interests, and if the state's interest in adjusting its

taxing system so as to provide favored treatment to charities serving residents prevails in this case, it will always prevail. The opposing interest is simply the obverse. And the tax discrimination will always be admirably suited to the purpose. Thus, as a practical matter the proposed rule would likely simply strip charities and those they serve from the protection of the Commerce Clause against economic discrimination.

But it is not necessary to know whether the consequence of the doctrine would be complete, or merely virtual, immunity from the dormant Commerce Clause to consider whether there is warrant for any differential treatment at all. We now examine that question, but first note preliminarily that the exemptions this Court has recognized surely provide no support for such an innovation. One, the "market participation" exemption, under which a state acting as a market participant rather than a governmental regulator is not subject to the Constitutional provision, is simply irrelevant.[42] The second, the compensatory tax exemption, under which a facially discriminatory tax on interstate commerce is valid if it simply balances a comparable tax on intrastate commerce,[43] argues against sanctioning discrimination against charities, for it is grounded in the principle of equality, not inequality.[44]

---

[42] See *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980); *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

[43] "[A] facially discriminatory tax may survive Commerce Clause scrutiny if it is a truly 'compensatory tax' designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Fulton Corp.*, 116 S. Ct. at 851 (citation omitted). See also, *e.g.*, Justice Cardozo's classic explanation in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 584 (1937) ("When the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. . . . [T]he sum is the same when the reckoning is closed.").

[44] We refer to the compensatory tax doctrine as involving an "exemption" because, once the tax is found to be compensatory,

B. The Legislative Intent—Presumed and Actual.

There is a very practical reason for not exempting this provision from examination under the ordinary Commerce Clause canons—doubt respecting the purpose of the legislature. One important function of the "available alternatives" test is to put the state to its proof as to the asserted statutory purpose. If the law appears to be related to a health or safety issue but also adversely impacts interstate commerce, and if the legislature has declined to employ a reasonable non-discriminatory alternative, it is fair to conclude that its real purpose may have been different than the purpose proclaimed. This seems clearly to have been an aspect of the Court's reliance upon the available alternative test.[45]

---

the Commerce Clause is inapplicable, just as it is in the market participation cases once it is determined that the state occupies that role. Alternatively, we could have included compensatory tax decisions with *Maine* v. *Taylor* as situations where there was no available alternative to achieve a legitimate result. See, *e.g.*, *Oregon Waste Systems*, 114 S. Ct. at 1352 ("[T]he concept of the compensatory tax . . . is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.") We place the cases here because the justification advanced for § 652 (1)(A)(1) has nothing at all to do with the compensatory tax doctrine but does bear some relation to the police power cases. That is, the inequality of the tax burden is admitted, but defended in terms of a supervening local interest. At any rate, our point respecting the compensatory tax cases is the same however they are classified: they stand for the principle of equality, the preeminence of which is confirmed by the strictness with which the Court has applied this doctrine. As the Court noted in *Fulton*, 116 S. Ct. at 859 & n.8, except for one 1869 decision, the Court has refused to sanction as "compensatory" any tax other than one that is part of a sales/use tax combination.

[45] Thus, in *Hunt* the Court observed that "[d]espite the statute's facial neutrality," there are "some indications in the record" that "its discriminatory impact on interstate commerce was not an unintended byproduct." But, the Court said, it "need not ascribe an economic protection motive" to the state legislature. It was enough

In our argument, we assume that the purpose of the legislature was precisely that which is reflected by the terms of the statute, namely, to provide public support through the taxing mechanism for those, and only those, charitable institutions that serve primarily state residents. But our assumption may well be contrary to fact. There was *no* discussion during the legislative debate about the desirability of limiting tax support to the provision of charitable services to residents. Rather, there was a good deal of discussion about the desirability of raising money and of preventing fraud by ostensibly charitable organizations—as to which, of course, much more suitable alternatives were at hand—as well as indications of considerably less benign purposes—both animus toward nonresidents and the one legislative purpose, economic protectionism, that has repeatedly been identified by this Court as a badge of Constitutional infirmity.[46] See, *e.g.*, *Bacchus Imports*, 468 U.S. at 270; *Philadelphia* v. *New Jersey*, 437 U.S. at 624.

In these circumstances, it is reasonable to wonder about the real motivation for this statute. And that question is

---

that "nondiscriminatory alternatives . . . are readily available." 432 U.S. at 352-54. See also *BT Investment Managers*, 447 U.S. at 43.

[46] The legislative history of the bill is reproduced at Pet. 22a-28a. One supporter of the bill said he would "want . . . the members of the House" "to know" that the bill "has been approved in essence by a great many of the camps that are operating," presumably those who would not lose their exemptions. Pet. 23a. The other arguments for the bill were based on (1) the need to raise money; (2) the desire to raise it from "institutions that are set up within the State of Maine by out-of-state people for out-of-state people"—the "main goal"; (3) a belief that the existing law was being abused by "persons outside the State of Maine who come here, where it is a simple matter to incorporate, set up a summer camp and they call themselves a charitable institution"; and (4) the corresponding belief that the bill will not "affect any business that is in the State run by anybody that is in this State." Pet. 23a-28a.

legitimate, since this Court has held that the "stricter rule of invalidity" may be invoked upon the results of "[e]xamination of the State's purpose." *Bacchus Imports*, 468 U.S. at 270, 271 (holding the "more flexible approach" not applicable partly because of the "legislature's motivation"). However, there has been debate about this issue;[47] and the evidence here is undeniably not as strong as it was in *Bacchus*. Accordingly, we point to the legislative history, not as a basis for positing a purpose other than that indicated by the statutory language, but rather as a reason for applying the *per se* rule with its component requirement that reasonably adequate nondiscriminatory alternatives be unavailable.

C. The Significance of the Presumed Intent of § 652(1)(A)(1).

If the purpose of the statutory restriction be assumed to be to insure that public expenditures in support of charities will benefit residents rather than non-residents, it seems clear from this Court's decisions that, if the purpose is of a type that does not condemn the statute, neither does it save it. The aim is not grounded in economic protectionism. But, as we have suggested, neither does it match the police power as a fundamental constituent of state political authority. Rather, it would appear to stand on about the same plane as many other legitimate purposes of statutes that have, nonetheless, been held violative of the dormant Commerce Clause.

The Court addressed this issue of the role of legislative intent in dormant Commerce Clause cases in *Philadelphia* v. *New Jersey*. There, in a frequently quoted passage, the Court emphasized that a legitimate goal will not redeem a Constitutionally impermissible means.

---

[47] See, *e.g.*, *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 677 (majority opinion), 680-83 (Brennan, J., concurring), 702-04 (Rehnquist, J., dissenting) (1981).

> "This dispute about ultimate legislative purpose need not be resolved, because its resolution would not be relevant . . . . [T]he evil of protectionism can reside in legislative means as well as legislative ends. Thus, it does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. . . ." 437 U.S. at 626.

Since the law was discriminatory "[b]oth on its face and in its plain effect," it was invalid because it constituted an illicit means, even if in the service of a licit end, just as had been true in prior cases involving legislation aimed at "assur[ing] a steady supply of milk," [48] "creat[ing] jobs by keeping industry within the State," [49] or "preserv[ing] the State's financial resources from depletion by fencing out indigent immigrants." [50] 437 U.S. at 627. Or, the Court added in *Chemical Waste Management*, "to encourage the use of ethanol and thereby reduce harmful exhaust emissions," [51] or "to support inspection of foreign cement to insure structural integrity." [52] 504 U.S. at 341.

---

[48] Citing *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. at 522-524.

[49] Citing *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 10.

[50] Citing *Edwards* v. *California*, 314 U.S. 160, 173-174.

[51] Citing *New Energy Co.* v. *Limbach*, 486 U.S. 269, 279 (1988).

[52] Citing *Hale* v. *Bimco Trading, Inc.*, 306 U.S. 375, 379-380 (1939). Nor does it matter whether, as the Law Court believed, it was "not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine." Pet. 6a. As this Court noted in *Bacchus Imports*, rejecting a defense that the law was "not enacted to discriminate against foreign products, but rather, to promote a local industry":

> "If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other. . . ." 468 U.S. at 273 (citation omitted).

The assumed purpose, then, if unobjectionable, is not exculpatory either.

D. The Policy of the Dormant Commerce Clause.

The respondent has argued that § 652(1)(A)(1) falls outside the range of the dormant Commerce Clause because that Constitutional provision applies only to statutes designed to give "for-profit organizations . . . a competitive advantage over . . . out-of-state producers." Br. Opp. 9. The Law Court, in referring to the statute as "bear[ing] no resemblance to the types of economic regulation" falling within the purposes of the Commerce Clause (Pet. 6a), seems to have held the same view. Such a restrictive reading collides with precedent and the purposes of the Clause.

It is true that dormant Commerce Clause litigation has generally involved private for-profit enterprises. But the Commerce Clause speaks simply of interstate commerce, not for-profit interstate commerce. And in *Edwards* v. *California* the Court explicitly confirmed that the dormant Commerce Clause reaches interstate commerce, there in the form of private transportation, whether or not commercial.

Moreover, while in *Edwards* there was no touch of commercial relations, that certainly is not true of the case at bar, as we have already noted (*supra*, pp. 19-21). To begin with, non-profit organizations in this country are collectively, and in many cases individually, "big business" in every sense except that they have purposes other than making a profit. We leave to *amici curiae* a self-description, but all know that in terms of every indicia—number of employees, wages and benefits, purchase of goods and services—non-profits are major players in the American economy.[53] Accordingly, their activities

---

[53] "In 1990, exempt organizations' total assets exceeded $1 trillion, their total gross receipts reached $807 billion, and their gross revenues totaled approximately $560 billion, or 10.5 percent

are, of course, subject to regulation by Congress under the Commerce Clause.[54] If those activities were not reached by the dormant Commerce Clause, the congruity between the affirmative and negative aspects of that provision that this Court has marked would be disrupted. See *supra* p. 21.

As to the particular activities here in question—the provision of services to campers, residents of nursing homes and boarding facilities, patients at mental health service facilities and the like—commercial relationships are central. The patrons, who are the persons likely to be ultimately affected by the tax, enter into contracts with the service providers, and from the patrons' viewpoint it makes no difference whether those providers are non-profit or for-profit. The situation is no different where the provider is a for-profit enterprise (as, of course, many organizations like camps and nursing homes are). It is the ultimate "non-profit" consumer who is likely to pay for the discriminatory tax through higher prices. If it is a discriminatory hotel tax, it is the non-resident who either pays more or decides not to travel, just as in this case it is the non-resident camper who may be excluded by quota or deterred by higher fees—or, depending on the magnitude of the tax, not have a Christian Science camp to attend.

And of course these non-profit organizations are in competition with other organizations providing the same service. To fulfill their mission, they must establish, maintain, and strengthen their organizations; and to do that they must attract both contributions and, if they are the

---

of the gross national product. Exempt organizations employ approximately eight million people." Frances R. Hill & Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* ¶ 1.01, at 1-1 (1994) (footnotes and citations omitted).

[54] *NLRB* v. *Yeshiva University*, 444 U.S. 672, 681 n.11 (1980) ("Congress appears to have agreed that nonprofit institutions 'affect commerce' under modern economic conditions.")

sort of service organizations involved here, patrons. It would blink reality to suggest that summer camps and nursing homes and boarding homes, profit or non-profit, are not in competition.[55]

But beyond the policy respecting free channels of commerce that is directly implicated by § 652(1)(A)(1), there is a broader, perhaps more fundamental, policy at stake. Indeed, the Law Court took note of it: "The exemption statute bears no resemblance to the types of economic regulation that 'excite those jealousies and retaliatory measures the Constitution was designed to prevent.' " [56] But having raised the right question, the court got the answer backwards. We submit that this statute is exactly the sort that is likely to incite resentment and retribution. Accordingly, it is well within the zone of concern marked by the dormant Commerce Clause, "a chief occupation of [which] . . . was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis,

---

[55] While the Law Court did not so suggest with respect to camps in general, it did say that "nothing in the record suggests that Camps *competes* with other summer camps" because "Camps is unique, serving a very limited segment of the population who choose to attend Camps because of the religious affiliation and the desirability of the location and services." Pet. 6a. We note that for petitioner to lose the tax exemption because of the court's view of the consequences of its religious affiliation would raise serious free exercise issues. But as to the point at issue, first, if interstate commerce is unduly burdened, competition is not necessary, as *Edwards* demonstrates; second, there is unquestionably competition among the affected organizations generally, and the challenge is to the statute both on its face and as applied (J.A. 14); and, finally, the court was wrong about petitioner, since competing camps are, of course, open to Christian Science families.

[56] Pet. 6a. (Citing *C & A Carbone, Inc.* v. *Town of Clarkstown*, 116 S. Ct. at 1682.)

History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259." *G.A.F. Seelig*, 294 U.S. at 522.

In *Edwards*, this Court recognized that "[t]he prohibition against transporting indigent non-residents into one State is an open invitation to retaliatory measures . . . ." 314 U.S. at 176. Similarly, what Maine says to other states through this statute is not just that charity begins at home, but that it ends there too. In terms of impact, the message is quite different than that conveyed by direct assistance to state residents. "In the words of Justice Holmes, 'even a dog distinguishes between being stumbled over and being kicked.' "[57] Overtly targeting charities for serving non-residents is the very sort of "interfering and unneighborly regulation" that the Constitution was designed to end:

> "The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have . . . given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, will be multiplied and extended . . . . [W]e may reasonably expect from the gradual conflicts of state regulation that the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." Alexander Hamilton, *The Federalist No. 22* (1787).

Moreover, the potentially destructive impact of empowering states to exact discriminatory property taxes would, in our view, be augmented by their consequent power to restrict charitable state income tax deductions in the same way. We see no basis for distinguishing between the two. And if a state concluded that there was enough to gain to warrant taking the first step, it is hard

[57] O.W. Holmes, *The Common Law*, p. 3 (1881), quoted in Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1252 (1986).

to see why it would stop short of the other. But surely it is unlikely that a significant move by one state to advantage its own at the expense of its neighbors would be contained. If Virginia, say, were to disallow deductions for contributions to charities serving many District of Columbia or Maryland residents, one would not suppose those jurisdictions would long abide without responding in kind.[58]

We leave to *amici curiae*, who are much better informed than we, the quantification of the potential impact of such legislation upon the non-profit community. It would, of course, be enormous. The property of virtually every well-known, and many not so well-known, private colleges and universities in the country would be exposed.[59] And restrictions on tax deductions would put at risk the principal source of funding for countless other non-profit organizations, including, it may be presumed, every national charity.

What we wish to underscore is the legal significance of this potential disruption of the nation's network of non-profit organizations. We suggest that such a fracturing of support for charities along state boundaries would be foreign to this country's traditions. The pattern of ex-

[58] The respondent discounts this fear because the 1963 state court decision upholding this statute against attack on other grounds than presented here "did not lead to a stampede of states and municipalities enacting similar legislation." Br. Opp. 7. But of course the impact of a state court affirming an obscure statute of very limited applicability on non-Commerce Clause grounds is scarcely likely to match the reaction to this Court's affirmance of what has become a very well-known statute in litigation that is being watched carefully, as the *amici curiae* participation indicates. We add that, if this statute represented sound public policy, as respondent maintains, there would be no reason to be wary of its replication in all 50 states.

[59] Section 652(1)(A)(1) does not apply to educational institutions in Maine, which are covered by a different provision.

isting laws is evidence that it would. While we cannot pretend to have examined every state and local property tax, it is clear that the Maine statute is most unusual. We have found only one minor similar property tax provision and no limitations on state income tax deductions turning on residence of an organization's beneficiaries.[60]

The reasons may include a doubt about legality or a fear of retribution. This restraint may also, however, reflect a felt obligation to treat pervasive social needs as challenges to the national, as well as to the local, community. Such a sense of shared responsibility was noted in *Edwards* with respect to the pressing needs born of the Depression. In taking note of that spirit, the Court invoked Justice Cardozo's classic expression in *G.A.F. Seelig*, 294 U.S. at 523, of the fundamental values reflected in the dormant Commerce Clause. In rejecting the contention that the discriminatory legislation there involved should be sustained because designed to promote the welfare of the state's farmers, Justice Cardozo declared:

> "To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

That, at root, is the burden of our argument.

---

[60] See Mich. Stat. Ann. § 7.7(4n) ("Real estate not to exceed 400 acres of land in this state owned by a boy or girl scout or camp fire girls organization, a 4-H club or foundation, or a young men's Christian association or young women's Christian association is exempt from taxation under this act, if at least 50% of the membership of the association or organization are residents of this state," but residence requirement may be waived by county board of commissioners).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed. The case should be remanded to that court so that the state courts may award petitioner appropriate relief.

Respectfully submitted,

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Of Counsel

WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

May 10, 1996

* Counsel of Record

No. 95-1966

In The

Supreme Court of the United States

October Term, 1995

CAMPS NEWFOUND/OWATONNA, INC.,

Petitioner,

v.

TOWN OF HARRISON, et al.,

Respondents.

On Writ Of Certiorari
To The Maine Supreme Judicial Court

BRIEF FOR THE RESPONDENTS

WILLIAM L. PLOUFFE
DRUMMOND WOODSUM
& MACMAHON
245 Commercial Street
Portland, ME 04101
Tel: (207) 772-1941

Counsel for Respondents

June 12, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

57 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

The petitioner challenges the constitutionality of a Maine statute which directs municipalities to grant exemptions from real and personal property taxes to certain types of nonprofit organizations. Specifically, the petitioner challenges a portion of Me. Rev. Stat. Ann. ("M.R.S.A.") tit. 36, § 652(1)(A)[1] (hereinafter sometimes referred to as the "exemption statute"), which directs that exemptions be granted to "benevolent and charitable institutions" but conditions the exemption as follows: 1) those that benefit "principally" Maine residents receive a full exemption; 2) those that benefit "principally" nonresidents but charge only a nominal fee for their services receive up to $50,000 in property value exemption; and 3) those that benefit "principally" nonresidents and charge more than a nominal fee for their services receive no exemption.[2] It is important to note that, although the

---

[1] The relevant portion of the statute is set out at Pet. 20a-21a. Petitioner is in error when it cites the statute as § 652(A)(1)(A). There is no subsection "A".

Other provisions of the statute direct that exemptions be given to literary and scientific institutions, including colleges and universities, fraternal organizations, houses of religious worship, chambers of commerce and other groups. The statutory language at issue in the instant case concerning residency pertains only to charitable and benevolent organizations.

[2] The portion of the statute granting an exemption for the real and personal property of "benevolent, charitable . . . institutions incorporated by this State" was first enacted as a public law in 1845. P.L. 1845, Ch. 159, § 5, ¶ Second. See *O'Connor v. Wassookeag Preparatory School, Inc.*, 46 A.2d 861, 862 (Me. 1946). The language at issue in this case was enacted in

instant case involves a summer camp run by a nonprofit organization, the exemption statute pertains to a wide range of charitable and benevolent organizations.

The petitioner, which was denied an exemption because it benefits principally[3] nonresidents and charges more than a nominal fee, asserts that the exemption statute violates the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

The statute provides that an exemption may not be denied to a nonprofit organization by reason of the "source from which its funds are derived." Thus, the residency of those who contribute or pay fees to the nonprofit organization may not be used to deny the exemption.

It is of importance that the exemption statute pertains to taxes on all real estate and certain personal property in the Town of Harrison. The property is taxed at its "just value." Maine Const. art. 9, § 8; 36 M.R.S.A. § 201. The statute is not an exemption from a tax on

---

substantially its current form in 1957. Subsequent amendments are not material to the issues presented here.

[3] The statute is silent as to how to determine whether the charity operates "principally for the benefit" of nonresidents. Here, there was no question because the petitioner admitted that 95% of its campers were nonresidents (Joint Appendix ("J.A.") 44) and made no assertion that it provided any services to Maine residents other than the 5% of its campers from Maine.

If the petitioner opened its facilities to local residents, the value of the services provided would, arguably, be included in the "benefit" test. Further, if the petitioner charged only a nominal tuition, it would be eligible for a $50,000 exemption in value regardless of the residency of its campers.

business activity, *e.g.*, "camper days," or upon the campers themselves.

In sum, the exemption statute creates categories of charitable organizations based on the residency of those to whom they dispense their charity and, in so doing, sets up a kind of *quid pro quo*: Relief from property taxes in return for charitable services to Maine people.[4]

---

[4] Contrary to the petitioner's assertion (Petitioner's Brief ("Pet. Br.") 9), Maine's approach to determining which charitable organizations will be entitled to an exemption is not "virtually without precedent." Other jurisdictions have similar, although not identical, provisions. See, *e.g.*, 68 Okl. St. Ann. § 2887(8) (granting exemption from *ad valorem* taxation for charitable institutions, "provided the net income from such property is used exclusively within this state for charitable purposes"); N.C. Gen. Stat. § 105-3(3) (granting exemption from inheritance tax for foreign charitable corporations if the corporation is "receiving and disbursing funds donated in this State for religious, educational or charitable purposes"); D.C. Code § 47-1002(8) (real property exempt from taxation includes buildings belonging to charitable institutions "which are used for purposes of public charity principally in the District of Columbia"). These are in addition to the Michigan statute cited by the petitioner. Mich. Stat. Ann. § 7.7(4n).

The rationale for the distinction drawn by Maine and other jurisdictions in their statutes is common enough to warrant explanation in the treatise by E. Fisch, D. Freed & E. Schachter, *Charities and Charitable Foundations* § 796 (1974):

> Some states exclude from tax exemption property not used for the benefit of the citizens of the state from which tax exemption is sought, whether owned by a domestic or foreign charity. The rationale for denial has been formulated in terms of benefit to the local taxpayers. . . . "Such [an exemption] would be a direct

The petitioner is a Maine nonprofit corporation[5] which operates a 180 acre summer camp on the shores of Long Lake in Harrison, Maine.[6] While the petitioner may advertise its facility and recruit campers from other states, its product is delivered wholly intra-state.

The petitioner pays about $22,000 per year in property taxes.[7] By letter to the Harrison Town Manager dated

---

diversion of the state's resources at the expense of its resident taxpayers." (Footnotes omitted.)

Fisch *et al.*, at 619. The authors go on to discuss contrary rationales which hold that the charity should help people worldwide and should not be provincial. Which rationale to accept is, however, a legislative decision.

[5] The exemption statute has, for more than 150 years, provided that the tax exemption for charitable and benevolent organizations is limited to corporations organized under Maine law. It is not clear whether this language would be interpreted today as excluding from exemption eligibility non-Maine corporations registered to do business in Maine. If it were so interpreted, it would be of suspect constitutionality. See *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968). In any event, that issue is not presented in the instant case because the petitioner is a Maine nonprofit corporation and because the petitioner was not denied an exemption on the basis of that language in the exemption statute.

[6] Although not part of the record, the following information may be of interest to the Court. The Town of Harrison is located in Cumberland County, about 40 miles northwest of Portland. Its 1994 population was 2,200. *Maine Register* 1995-96.

[7] The petitioner's real estate taxes for 1989 were $24,639.65; for 1990 were $21,618.49; and for 1991 were $20,770.71 (plus $994.70 for personal property). J.A. 42-43, ¶¶ 26, 27, 28. Town of Harrison property tax bills show assessed values for "land," "buildings," and "personal property" and a tax for "real estate"

April 15, 1992, the petitioner demanded a tax refund for the years 1989 through 1991 and a continuing tax exemption pursuant to the exemption statute. J.A. 19. The petitioner acknowledged in that letter that "the principal number of our children" are out-of-state residents; made no claim that it benefits principally Maine residents; and acknowledged that the statute does not allow exemptions for such camps. Nevertheless, the petitioner claimed entitlement to an exemption on the grounds that the statute is unconstitutional. The Harrison Board of Assessors,[8] to whom the letter had been referred, responded through the Town Manager that they were not empowered to decide upon the constitutionality of the statute and they denied the exemption request.[9] J.A. 21.

---

and "personal property." Real estate includes land and buildings. Apparently the petitioner's bill from the Town of Harrison for 1991 showed a "real estate" portion of the bill at $20,770.71 and a personal property tax of $994.70. J.A. 43. The break-down is about 95% real estate and 5% personal property. Personal property would include such items as refrigerators, stoves, furniture, and equipment. Hereinafter, the term "real estate taxes" will be used to refer to the taxes here at issue.

[8] The municipal assessors act as agents of the State and must carry out State laws on taxation. *Dillon v. Johnson*, 322 A.2d 332 (Me. 1974). It is the municipal assessors who have authority to grant tax abatements and exemptions in accordance with State law. 36 M.R.S.A. § 841.

[9] The statute contains a number of "further conditions," not at issue here, to the right to an exemption. 36 M.R.S.A. § 652(1)(C). During the course of this litigation, the parties stipulated or did not contest facts that, but for the statutory provision at issue here, would qualify the petitioner for a full exemption as a charitable and benevolent institution. J.A. 36-46, 52-53.

The petitioner brought a two count complaint in the Maine Superior Court challenging the denial of the requested exemption. J.A. 13, *et seq.* The Superior Court granted summary judgment to the petitioner on the first count of its Complaint, finding that the exemption statute violates the Commerce Clause. The Superior Court rejected the petitioner's Equal Protection challenge. U.S. Const. amend. XIV. (The second count of the Complaint had been dismissed earlier. It alleged a violation of 42 U.S.C. § 1983.) Pet. 9a, *et seq.*

The respondents appealed the Superior Court decision to the Maine Supreme Judicial Court, sitting as the Law Court (hereinafter "Law Court").[10]

---

[10] This was the second time that the Law Court was faced with a constitutional challenge to the exemption statute. In *Green Acre Baha'i Institute v. Town of Eliot*, 193 A.2d 564 (Me. 1963), the Law Court upheld the same statutory provision, stating:

> We cannot say that it is unreasonable for the State to require the ordinary and normal support of government when a corporation as here principally benefits nonresidents, and to remit taxes when benefits accrue to our own residents. Exemption from tax places an equivalent burden on the remaining taxpayers. Loss in tax revenue from exemption must be balanced by increased assessments on others.
>
> In our view, the denial of exemption to the property of a Maine benevolent and charitable corporation "in fact conducted or operated principally for the benefit of (nonresidents)" is a constitutional exercise of legislative power.

Id. at 566.

This was also the second time that the Law Court was faced with a claim for a tax abatement by the petitioner. *Camps*

The Law Court reversed the Superior Court with respect to the Commerce Clause analysis and affirmed its holding with respect to the Equal Protection Clause. Pet. 7a. The Law Court also held that the exemption statute does not violate the Privileges and Immunities Clause. U.S. Const. art. IV, § 2, cl. 1. Pet. 7a-8a.

SUMMARY OF ARGUMENT

The Maine exemption statute does not discriminate on its face against interstate commerce and, therefore, the Law Court was correct in its decision to apply the "more flexible approach" and in its conclusion that the exemption statute does not violate the dormant Commerce Clause. However, this Court can affirm the Law Court's holding without reaching the question of whether the exemption statute should be analyzed under the "virtually *per se* rule of invalidity" or the "more flexible approach" (a) because real estate tax exemptions for charitable organizations are properly analyzed as expenditures of general fund money by the government to lessen its burden of providing social services and to promote the public good or (b) because Congress may not impose a national real estate tax and, therefore, State statutes providing exemptions from real estate taxes do not intrude into a sphere of Congressional authority and, thus, do not violate the dormant Commerce Clause.

Newfound/Owatonna, Inc. v. Town of Harrison, 604 A.2d 908 (Me. 1992).

1. Real estate taxes are an essential source of revenue for local governments. There is no right under the United States Constitution or the Maine Constitution to an exemption from real estate taxes and it is the province of State legislatures to determine which, if any, nonprofit organizations will receive an exemption and what criteria they must meet to qualify for the exemption. This type of "discrimination" among such organizations is not forbidden by the Commerce Clause. It is subject to review under the equal protection and due process provisions of both Constitutions and the privileges and immunities provisions of the United States Constitution.

2. The children and adults who attend the petitioner's camp are not articles in interstate commerce but, rather, are consumers crossing State lines to purchase and "consume" camping services delivered within Maine. The fact that the campers cross State lines to consume the petitioner's services does not convert those services from intra-state to interstate articles of commerce.

3. The exemption statute is facially and fundamentally about taxation of real estate, a type of property that cannot be exported or imported across State lines. Any effect that the statute has on interstate commerce by causing the petitioner to charge higher tuition or to provide fewer services is secondary and incidental and does not invoke the "virtually *per se* rule of invalidity."

4. The exemption statute is properly viewed as an expenditure of government general fund money to lessen the government's social service burden and to foster the societal benefits provided by charitable organizations.

The exemption statute thus falls under the "market participant" exception to the dormant Commerce Clause or is a valid governmental subsidy of charitable organizations.

5. Congress is prohibited by U.S. Const. art. I, § 9, cl. 4 from taxing real estate without apportioning the tax among the States according to their populations. Any such apportionment effort would run afoul of due process and equal protection concepts. Since Congress cannot regulate in this area, there can be no dormant Commerce Clause violation if the States enact statutes providing exemptions from real estate taxes.

ARGUMENT

INTRODUCTION

The petitioner has cited no opinion of this Court or any other court and the respondents have found no such opinion, which applies a Commerce Clause analysis to exemptions from real estate taxes. The petitioner would have this Court understand that the tax exemption here at issue is indistinguishable from the property tax exemption struck down in *I.M. Darnell & Son v. Memphis*, 208 U.S. 113 (1908) and, therefore, that the respondents' arguments concerning the implications of the exemption statute's pertaining to real estate are "foreclosed by precedent." Pet. Br. 24. In fact, the exemption at issue in *I.M. Darnell* pertained to personal property – logs – imported from a neighboring state into Tennessee. The distinction between real property, which has a fixed location, and personal property, which is movable across state

lines, is critical. This Court's opinion in *I.M. Darnell* does not apply a Commerce Clause analysis to real estate taxation and does not foreclose the arguments made herein.[11]

There are opinions of this Court and of other courts which address the constitutionality of real estate tax exemptions for charities similar to that at issue here. Those cases employ a Fourteenth Amendment or Privileges and Immunities Clause analysis, or both; not a Commerce Clause analysis. See *WHYY, Inc. v. Glassboro*, 393 U.S. 117 (1968) (New Jersey statute denying nonprofit corporation real estate tax exemption based on out-of-state incorporation violates Fourteenth Amendment); *Board of Education of Kentucky Annual Conference of Methodist Episcopal Church v. Illinois*, 203 U.S. 553 (1906) (upholding under the Privileges and Immunities and Equal Protection Clauses an inheritance tax exemption requiring charity to be exercised within Illinois in order for a bequest to qualify for an exemption); *Green Acre Baha'i Institute v. Town of Eliot*, 193 A.2d 564 (Me. 1963) (upholding the same statute here at issue under a Fourteenth Amendment equal protection analysis).

The petitioner has cited no opinion of this Court or any other court which applies a dormant Commerce

---

[11] The respondents are aware of one case in which the constitutionality of a real estate tax was analyzed under the Commerce Clause. The California Court of Appeal held that a tax on real estate does not restrict interstate commerce and, thus, does not violate the Commerce Clause. *R.H. Macy & Co. v. Contra Costa County*, 276 Cal. Rptr. 530 (Cal. App. 1 Dist. 1990), *cert. granted*, 500 U.S. 951, and *cert. dismissed*, 501 U.S. 1245 (1991).

Clause analysis to a tax exemption of any type for charitable organizations. Nor has the petitioner cited any opinion of this Court or any other court which holds that travel across state lines by a consumer to purchase a good or a service invokes a dormant Commerce Clause analysis.

The respondents contend that the reason for this notable absence of cases involving claims like those made by the petitioner is that the Commerce Clause does not pertain to taxes on real estate and does not pertain to tax exemptions for nonprofit organizations.

Nevertheless, the Law Court did apply a Commerce Clause analysis and found that the exemption statute does not violate the dormant Commerce Clause principles enunciated by this Court. Thus, the first part of the respondent's argument will be devoted to a discussion of the correctness of the Law Court's holding. The second and third parts of the argument will discuss why the exemption statute fits within the "market participant" or "subsidy" exceptions to the dormant Commerce Clause and why the exemption statute cannot be found to violate the dormant Commerce Clause because it does not intrude into an area of Congressional authority. If the second or third part of the respondents' argument is accepted by the Court, then there is no need to consider the first part of the argument since a Commerce Clause analysis will not pertain.

I. THE EXEMPTION STATUTE DOES NOT FACIALLY DISCRIMINATE AGAINST INTERSTATE COMMERCE AND THE LAW COURT'S CHOICE OF THE "FLEXIBLE APPROACH" TO ANALYZE THE EXEMPTION STATUTE WAS CORRECT. THE EXEMPTION STATUTE SURVIVES SCRUTINY UNDER THE FLEXIBLE APPROACH.

Taxation is the rule and exemption from taxation is the exception. *Silverman v. Town of Alton*, 451 A.2d 103, 105 (Me. 1982). The Maine Legislature has broad authority to determine which properties are subject to taxation and is under no constitutional obligation to grant property tax exemptions to any charity, college or other eleemosynary institution. See *In re Maine Central R.R. Co.*, 183 A. 844 (Me. 1936). The State has, nonetheless, decided to grant exemptions to some, but not all, charities and has decided to attach conditions to some of those exemptions.

There is no doubt that the exemption statute "discriminates" in the sense that it creates categories of property owners and treats them differently.[12] However,

---

[12] The fundamental discrimination is, of course, between nonprofit organizations and for profit businesses. There are many for profit summer camps in Maine. Although the record is devoid of any evidence to support the petitioner, the petitioner not only admits but also argues strenuously that it is in competition with summer camps that are for profit businesses as well as those that are nonprofit. Pet. Br. 41. Petitioner apparently believes that there is no constitutional problem with its being tax exempt and, consequently, having a clear economic advantage over for profit camps, but that there is a problem with its not being tax exempt when nonprofit camps that benefit principally Maine residents are tax exempt. Respondents assume that petitioner would argue that the exempt nonprofit/

discrimination is not necessarily a constitutional violation. The very statute at issue here has been upheld by the Law Court against challenges based upon the Equal Protection and Privilege and Immunities Clauses. *Green Acre Baha'i Institute v. Town of Eliot, supra.* Cf. *WHYY, Inc. v. Glassboro, supra* (suggesting that denying exemption based on foreign corporation's failure to benefit the state in the same manner as do domestic nonprofit corporations would survive Fourteenth Amendment scrutiny). In fact, the statute was upheld on those grounds in the instant case and the petitioner does not seek to overturn those portions of the Law Court's decision. Nevertheless, the petitioner claims that the statute fails analysis under the dormant Commerce Clause because it facially discriminates against interstate commerce.

A. The Choice of Standard.

The respondents agree with the Law Court and the petitioner that the first step in determining whether a State statute violates the dormant Commerce Clause is to determine whether it should be analyzed under this Court's "virtually *per se* rule of invalidity" or its "more flexible approach." Pet. 5a, Pet. Br. 5. The *per se* rule of invalidity is used when a State statute directly regulates or discriminates against interstate commerce or when its

---

for profit camps distinction should be upheld under an equal protection analysis but that the exempt nonprofit/taxable nonprofit camps distinction fails under the Commerce Clause. Effectively, the petitioner would be arguing, somewhat counterintuitively, that the latter distinction is subject to more rigorous constitutional scrutiny.

effect is to favor in-state economic interests over out-of-state interests. *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573, 579 (1986). The flexible approach is used when the statute has only indirect effects on interstate commerce and regulates evenhandedly. *Id.* at 580; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[13]

The petitioner contends that the exemption statute facially discriminates against interstate commerce; that the *per se* rule of invalidity applies; and that the Law Court's fundamental error was its decision to apply the "flexible approach." However, the petitioner cannot show that the exemption statute, on its face, directly regulates or discriminates against those aspects of the petitioner's operations which constitute interstate commerce. Further, the exemption statute does not operate to deny out-of-state competitors access to Maine markets; does not tax out-of-state products or services more heavily than Maine products or services; and does not otherwise impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out-of-state.

---

[13] In analyzing State taxing measures, this Court has often employed the somewhat different four-part test in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). See, *e.g.*, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 115 S. Ct. 1331 (1995). (The Maine Superior Court used this test. Pet. 13a.) The petitioner does not argue that the exemption statute should be analyzed under the *Complete Auto* test. The third prong of that four-part test is that the State tax not discriminate against interstate commerce. The exemption statute clearly meets the other three prongs of the *Complete Auto* test (the Superior Court so found). Therefore, the petitioner would likely argue that the same result would obtain under both *Complete Auto* and the *per se* rule.

As discussed more fully in the following section of this Brief, the Law Court was correct in its choice of the flexible approach because there is no facial discrimination against interstate commerce.

B. There Is No Facial Discrimination Against Interstate Commerce.

The essence of the petitioner's argument is in the following statement by the petitioner:

> The Maine statute in issue facially discriminates against interstate commerce because in terms it denies a tax exemption to Maine charities if they provide services in Maine to too many persons who reside in other states. A predictable result is that the interstate agreements that underlie, and the interstate travel connected with, such provision of services will be deterred. And that deterrence constitutes the violation.

Pet. Br. 15-16.[14]

---

[14] The petitioner argues further that, even if there were no effect on interstate travel, the exemption statute would still fail the test of constitutionality:

> [A] law penalizing, solely because of residency, transactions between citizens of different states for the provision of services would, by virtue of that distinction alone, facially discriminate against interstate commerce. Neither interstate transportation of goods nor of persons is necessary to a dormant Commerce Clause violation.

Pet. Br. 16 n.17. The petitioner begs the question of whether the "transaction" is interstate commerce. For example, if a resident of New York buys an ice cream cone from a resident of Maine in

Since the petitioner asserts that its campers pay a higher tuition or get fewer services than they would if the petitioner was exempt from real estate taxes, J.A. 43, it, assumedly, is the prospective camper's reaction to the prospect of higher tuition/fewer services which is the cause of the "predictable result."

The campers are not before this Court and the record contains no evidence that either claimed consequence of the exemption statute, higher tuition or fewer services, has had any effect on any camper or would-be camper.[15] In any event, the Commerce Clause protects out-of-state competitors but does not protect out-of-state consumers. See *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 618 (1981) (state severance tax on coal that falls mostly on out-of-state utility consumers is not discrimination under Commerce Clause).[16]

Maine, that does not mean that the sale of the ice cream cone is interstate commerce. Residency of the contracting parties is not the deciding factor. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253 (1938) (mere formation of a contract between persons in different states is not within the protection of the Commerce Clause unless the performance is within its protection). The respondents would agree, however, that a law penalizing transactions solely because of the residency of the parties would be subject to analysis under the Equal Protection Clause.

[15] The petitioner cites *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996), for the proposition that no *de minimis* exception to a facially discriminatory tax is recognized by this Court. Pet. Br. 22. The record here shows no actual impact on camper choices. All impacts must be inferred.

[16] To the extent that taxes are passed on to campers in the form of higher tuition or fewer services, it falls upon both in-state and out-of-state campers. Further, to the extent that

The petitioner's argument should focus upon its product, camper services, rather than upon the campers. However, such a focus presents the petitioner with problems in a dormant Commerce Clause argument. First, the petitioner is not an out-of-state competitor attempting to gain access to a Maine market on an equal footing with Maine businesses. Second, its product is delivered and "consumed" entirely within Maine. This means that the petitioner is not a Maine business either importing or exporting products in interstate commerce.

In order to overcome these problems with its argument, the petitioner treats its campers who travel across state lines as articles in interstate commerce and then argues that the exemption statute discriminates against it because it "imports" articles of commerce. The petitioner makes a corollary argument, based on *Edwards v. California*, 314 U.S. 160 (1941) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), that the exemption statute discriminates against the campers' interstate travel and that this is the equivalent of discrimination against out-of-state products that is forbidden by the dormant Commerce Clause. Pet. Br. 19-21. The petitioner's arguments are flawed.

1. The campers are not articles in interstate commerce.

The petitioner would have this Court treat the campers who travel to Maine from other states as articles

---

campers of tax exempt camps benefit from the exemption, that benefit flows to both in-state and out-of-state campers.

in interstate commerce and view the exemption statute as facially discriminating against the petitioner because it deals in articles of interstate commerce. There are two bases upon which the petitioner attempts to support this proposition. The first is that the campers are "articles" and the second is that the campers' travel across State lines converts a service delivered and consumed locally into a transaction which implicates the Commerce Clause. With respect to the first point, no case cited by the petitioner treats consumers who purchase goods or services as themselves being articles in commerce. Unlike the goods and services that have been the focus of this Court's Commerce Clause analyses, consumers make a choice of whether to travel across state lines to purchase goods and services. That choice is influenced by many factors; some of these are price, the State's tourism promotion efforts and, here, the petitioner's advertising and recruitment efforts. The campers are not imported from another state into Maine (Cf. *I.M. Darnell & Son v. Memphis, supra* (saw logs imported into Tennessee)), or exported by the petitioner from Maine to another State (Cf. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (waste exported from Pennsylvania into New Jersey)). If the petitioner's position were accepted, then the hunter who crosses state lines and purchases a nonresident hunting license would be an article in commerce. Cf. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). The student who crosses state lines to attend a state university and pays nonresident tuition would be an article in commerce. Cf. *Johns v. Redeker*, 406 F.2d 878 (8th Cir.), *cert. denied*, 396 U.S. 853 (1969); *Vlandis v. Kline*, 412

U.S. 441, 452 (1973). The implications of viewing consumers as articles in commerce are far reaching.[17]

The second basis for the petitioner's proposition is that the campers' travel across state lines to purchase and use the petitioner's services somehow converts the service provided by the petitioner entirely within Maine into

---

[17] The petitioner contends that the interstate commerce here is the same as that for a college. Pet. Br. 19. If the Commerce Clause analysis urged here by the petitioner were applied to nonresident tuition differentials at public colleges and universities, the justifications that have been accepted under an Equal Protection analysis would be unavailable. The students would be articles in interstate commerce and the States could not burden that commerce by imposing higher tuition than those charged to resident students. This would be a line of reasoning and, likely, a result completely at odds with this Court's views expressed pursuant to an equal protection analysis in *Vlandis*:

> We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.

Vlandis v. Kline, 412 U.S. at 452-453.

Further, Chief Justice Burger, in his dissent, wrote:

> It is not narrow provincialism for the State to think that each State should carry its own educational burdens. Until we redefine our system of government – as we are free to do by constitutionally prescribed means – the States may restrict subsidized education to their own residents. This much the Court recognizes and it likewise recognizes that the statutory scheme under review reasonably tends to support that end.

Id. at 459-460.

a product in interstate commerce. This Court has never gone so far and, in fact, has rejected the argument that a business carried on intra-state is converted to an inter-state business because customers from out-of-state are induced to patronize the business. *Western Live Stock v. Bureau of Revenue*, 303 U.S. at 253 (taxation of a local business separate and distinct from the transportation and intercourse which is interstate commerce is not forbidden merely because such transportation or intercourse is induced or occasioned by the business). If the campers' choice to cross state lines to consume a product or service made the product or service an article in interstate commerce, then intra-state commerce would virtually cease to exist. See *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 115 S. Ct. 1331 (1995) (sale of ticket for interstate bus travel is a local transaction, and there is no requirement that tax on that sale be apportioned).

2. Neither *Edwards v. California* nor *Heart of Atlanta Motel, Inc. v. United States* supports the position that the Commerce Clause protects campers crossing State lines against the alleged effects of the exemption statute.

A corollary argument to the petitioner's argument that campers are articles in commerce is that the dormant Commerce Clause protects interstate travel by persons just as it protects the interstate transportation of goods. The petitioner states:

> [I]t cannot be argued that the interstate travel necessarily associated with petitioner's service of non-residents is unprotected. For it is established that the dormant Commerce Clause protects interstate travel just as it does interstate transportation of lumber.

Pet. Br. 20. For this proposition, the petitioner relies upon *Edwards v. California, supra*. The petitioner's reliance is misplaced. *Edwards* involved a Depression era California statute making it a misdemeanor, *i.e.*, a crime, to transport nonresident indigent persons into that State. It is true that Justice Byrnes, writing for himself and four other members, found that the California statute offended the Commerce Clause. However, Justice Douglas, writing for himself and two other members, filed a concurring opinion finding the right of travel to be a fundamental right of citizenship protected by the Privileges and Immunities Clause. Justice Jackson also filed a concurring opinion in which he relied upon the Privileges and Immunities Clause. Essentially, *Edwards* is an early "right-to-travel" or "personal mobility" case. See R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 11.10 (2d ed. 1992). The quintessential right-to-travel case came some years later in *Shapiro v. Thompson*, 394 U.S. 618 (1969). That opinion does not rely on the Commerce Clause for the "right to travel." See *id.* at 630 n.8.

Edwards simply does not support the proposition which, ultimately, the petitioner wants it to serve, *viz.*: that the Commerce Clause regards people making consumer choices and traveling across State lines to act on

those choices the same as it regards objects shipped in interstate commerce.[18]

The further distinguishing aspect of *Edwards* is California's obvious purpose to keep indigent persons out of California by penalizing those who transported them into the State. As pointed out by the Law Court, there is no intent in the Maine exemption statute to keep nonresident campers out of Maine. Pet. 6a.

The petitioner also relies on *Heart of Atlanta Motel, Inc. v. United States, supra.*[19] However, *Heart of Atlanta Motel* is distinguishable from the case at bar in important respects. *Heart of Atlanta Motel* was a "positive" Commerce Clause case involving a challenge to Congress' authority to enact the public accommodations provisions of the Civil Rights Act. The Court found that Congress has that authority and noted that Congress had before it "overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Id.* at 257. Overnight accommodations were essential facilities for African Americans seeking to exercise their right to interstate travel. *Heart of Atlanta Motel,* properly interpreted, stands for the proposition that Congress may regulate the provision of services which are essential to the ability of citizens to exercise their right to interstate travel. This Court has referred to these services as the

---

[18] The respondents would agree that the Commerce Clause protects the provision of transportation, *e.g.,* bus service, to persons crossing State lines.

[19] That opinion is also cited in a "see" citation by the Maine Superior Court. Pet. 14a-15a n.2.

"channels of interstate commerce." *United States v. Lopez,* 115 S. Ct. 1624, 1629 (1995).

The Court's opinion in *Heart of Atlanta Motel* does not compel the conclusion here that the Commerce Clause protects the campers' interstate travel from the alleged deterrent effects of the exemption statute. Marginal increases in tuition for petitioner's campers – both resident and nonresident – are very different from preventing travelers from using lodging accommodations. The Law Court found:

> [A]lthough the record suggests that the denial of a tax exemption results in increased costs that are passed along "to some extent" to the campers in the form of increased tuition, there is no evidence that the exemption statute impedes interstate travel or that Camps provides services that are necessary for interstate travel.

Pet. 7a. In fact, the petitioner is not engaged in providing lodging or any other service necessary for interstate travel.[20]

---

[20] At several points in its Brief, the petitioner suggests that a State could not, under the dormant Commerce Clause, "penalize" a hotel for "importing" nonresident guests (Pet. Br. 20) or enact an exemption from an accommodations tax for hotels that serve mostly State residents (Pet. Br. 32). Such legislation might well fail under an equal protection or due process analysis but it would not necessarily trigger a dormant Commerce Clause analysis. Whether the Commerce Clause would be implicated would depend upon whether affecting the price of lodging through tax policy would be viewed as disrupting the right of citizens to move in interstate travel. The hypothetical posited by the petitioner is much different from the outright denial of accommodations which the Court found so

Since the campers are not articles in interstate commerce, the exemption statute does not facially discriminate against the petitioner based upon its providing camper services.

C. The Exemption Statute Pertains to Real Estate and Not to Articles in Interstate Commerce and Is Properly Analyzed Under the Flexible Approach. Any Effect on Interstate Commerce Is Indirect. The Exemption Statute Survives Scrutiny Under the Flexible Approach.

Even if one assumes that the campers are articles in interstate commerce and, therefore, that the petitioner engages in interstate commerce because of providing services to them, the exemption statute still does not facially discriminate against interstate commerce because the statute is fundamentally about taxation of real estate. Any effect that it has on articles in interstate commerce, *i.e.*, the campers, is secondary and incidental and does not invoke the rule of *per se* invalidity.

As noted earlier, this Court has never found that taxes on real estate implicate a Commerce Clause

---

compelling in *Heart of Atlanta Motel*. Further, if the Commerce Clause were implicated, it is likely that any effect would be viewed as incidental, if the tax was upon real estate, and, therefore, the flexible approach would apply. It is not clear that the State's interest in making such a distinction would be sufficient to survive analysis under the flexible approach. The State's interest certainly would be different from that in the instant case.

analysis.[21] Yet, this is precisely what the petitioner is asking from this Court in the instant case.

The exemption statute creates an exemption from real estate taxes that are assessed by municipalities based upon the "just value" of the property as of April 1st each year. The tax is assessed on land, buildings and equipment of all residential, commercial and industrial property owners in each municipality, except as exempted by the State. (Those taxed include the many for profit summer camps in Maine.) The tax revenue is placed in the general fund of the taxing municipality to fund police, fire, road maintenance, recreation and other services. The exemption here turns upon the property owner (it must be a charity) and the use of the property (it must be used exclusively for charitable purposes and for the benefit of residents).

The Law Court found that the exemption statute does not tax the persons served by the charity:

---

[21] In *R.H. Macy & Co. v. Contra Costa County, supra* note 11, the California Court of Appeal addressed the application of the Commerce Clause to Proposition XIII, which allowed real estate to be taxed at its acquisition value:

> [A]rticle XIII A does not restrict interstate commerce because it taxes only real property within the state. It is widely recognized that interstate commerce deals with the flow of goods and services between and among the several states (citations omitted) and that "A tax on property or upon a taxable event in the state, apart from operation, does not interfere [with interstate commerce]." (*Southern Pac. Co. v. Gallagher*, 306 U.S. 167, 178, 59 S. Ct. 389, 394, 83 L.Ed. 586 (1939).)

276 Cal. Rptr. at 541.

> Moreover, the exemption statute is not directed at taxes on the persons served by the charity but, rather, on real property taxes for which the charity would otherwise be liable.

Pet. 6a. The tax is "twice removed" from the camper: First, it is a tax on the real estate; second, it may be built into the tuition; third, the camper pays a portion of the tax in the form of tuition. The exemption statute does not discriminate based upon the residency of the purchaser of the service but on the residency of the person benefitted by the charity. Here, the purchaser and the person benefitted happen to be the same person.

The petitioner states that the tax paid by the petitioner is, to some extent, passed on to the campers, Pet. Br. 3, and that this "deters" interstate travel and interstate agreements. Pet. Br. 16. However, if the charitable organization charged nothing for its services, *e.g.*, in the case of a "soup kitchen" or a camp which served indigent persons, then there would be no pass-through of taxes to the interstate traveler and no interstate agreements and, therefore, no "deterrence." This proves the point made by the Law Court. Any effect on the consumer and, thus, on the business of the charity, is secondary and not apparent on the face of the exemption statute or felt in its primary effect.

The point is further made by the case of a charitable organization that is headquartered in one State but provides its service almost entirely to persons who reside in another State and who do not travel to the "headquarters" State to benefit from the service. In such a situation, there would be no travel to be "deterred." This very situation, which the petitioner calls a "fanciful construct"

(Pet. Br. 16 n.17), appears to exist in the District of Columbia, which has an exemption provision requiring charitable services to be delivered within the District in order to qualify for an exemption. D.C. Code § 47-1002(8), *supra* note 4. The District would appear to be the headquarters for many nonprofits. (Six of the *amici* list addresses in the District.) It is highly unlikely that groups such as the National Association of Independent Colleges and Universities or the National Council of Nonprofit Associations serve many residents of the District.[22] Thus, notwithstanding that the District "discriminates" against nonprofit organizations serving nonresidents, there is no travel to trigger the petitioner's Commerce Clause analysis.

Despite the petitioner's creative arguments attempting to make the exemption statute facially pertain to travel and articles in interstate commerce, the statute is fundamentally about real estate taxation, a form of taxation that is uniquely intra-state. See *Curry v. McCanless*, 307 U.S. 357, 364 (1939).[23] When viewed as an exemption

---

[22] The District of Columbia's interpretation of its exemption provision was challenged by the National Medical Association, a nonprofit organization serving physicians nationwide, on grounds other than the dormant Commerce Clause. *National Medical Association, Inc. v. District of Columbia*, 611 A.2d 53 (D.C. App. 1992).

[23] Respected commentators in the area of State taxation have not treated real estate taxes as invoking Commerce Clause scrutiny. In *Federal Limitations on State and Local Taxation*, the author discusses both Commerce Clause and Due Process Clause limitations on State taxation simultaneously on the basis that there is "often a close relationship or overlapping in the nature of the limitations that each clause places on state and

from real estate taxes, it is clear that the exemption statute does not facially discriminate against interstate commerce. It is even handed in its treatment; all charities operating in Maine have an equal opportunity to qualify for the exemption from a tax to which all property owners are subject by providing something in return to the State.

The fact that the petitioner may be engaged in interstate commerce does not place the petitioner in a preferred position with respect to local real estate taxes. Those engaged in interstate commerce must pay their fair share of State taxes. *Western Live Stock v. Bureau of Revenue*, 303 U.S. at 254 (not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business).

The petitioner does not argue directly that the exemption statute fails when analyzed under the flexible

---

local taxing power when multistate operations are involved." P. Hartman, *Federal Limitations on State and Local Taxation* § 2:1 at 12 (1981). However, he later states that challenges to the taxation of property only involve due process considerations since "interstate commerce is not involved." Hartman, § 2:8 at 40-41.

In *State Taxation*, the authors comment upon the Superior Court opinion in the instant case:

> [T]he Maine court's conclusion that the Commerce Clause bars the States from limiting a tax exemption to camps serving resident campers stretches the reach of the negative Commerce Clause to its limits, if not beyond.

J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 4.12[1][k][v] at S4-11, 12 (2d ed. 1993 & Supp. 1994).

approach but does criticize the Law Court for not engaging in an analysis of alternatives available to the Maine Legislature which would have lessened the burden on interstate commerce. Pet. Br. 30. The petitioner further argues that this Court should consider Maine's legislative intent when applying "ordinary Commerce Clause canons." Pet. Br. 35. After stating that it will assume a licit purpose – to provide public support for charities – the petitioner goes on to insinuate illicit legislative motivations. Pet. Br. 36-37. The respondents have argued against the petitioner's use of the legislative history of the exemption statute. Br. Opp. 12-14. That need not be repeated here.

The Law Court found that, if the exemption statute has any impact on interstate travel, it is incidental:

> [I]t is not the purpose of the exemption statute to affect the number of out-of-state campers attending summer camps within Maine. Because the exemption statute regulates evenhandedly with only incidental effects on interstate commerce, we apply the flexible approach . . . .

Pet. 6a. Going on to measure the statute under the flexible approach, the Law Court found a legitimate State interest in the statute's purpose to relieve charities from the burden of taxes on their limited budgets and thereby to recognize and promote the public benefits that they provide. Pet. 6a. It further found that the statute neither increases costs to out-of-state firms nor forces them to leave the market and that there is no evidence that the statute impedes interstate travel or that the petitioner provides services necessary for interstate travel. *Id.* at 7a.

Therefore, the exemption statute was found to meet the test under the flexible approach.

The petitioner's suggested alternatives available to the State deserve comment. They include vouchers to residents for use at licensed camps; payments made directly to the institutions to defray residents' fees; and the provision of subsidies to institutions. Pet. Br. 30-31. The petitioner suggests that all of these would be constitutional. Assumedly, the petitioner intends that it would get a tax exemption and that the State would pay for vouchers, make direct payments to defray residents' fees and/or pay subsidies. Yet, under each of these "alternatives," the State or its political subdivision would pay twice. First, it would lose tax revenues through the tax exemption. Second, it would take money from the general fund and pay it to the petitioner. It seems unlikely that any State would enact such a system. It is certainly not constitutionally required.

The Law Court correctly chose and applied the flexible approach.

II. THE EXEMPTION STATUTE FALLS WITHIN THE MARKET PARTICIPANT EXCEPTION TO THE DORMANT COMMERCE CLAUSE OR CONFERS A VALID SUBSIDY UPON CERTAIN CHARITIES. THE STATE CANNOT BE FORCED TO SUBSIDIZE TUITIONS FOR CAMPERS.

The Law Court recognized that tax exemptions, including those granted pursuant to the exemption statute, are explicitly characterized in Maine's statutes as

"tax expenditures."[24] Pet. 4a. Further, as the Law Court has found in another case, expenditures of public funds *via* the tax exemption place a tax burden upon nonexempt taxpayers just like any other public expenditures:

> Exemption from tax places an equivalent burden on the remaining taxpayers. Loss in tax revenue from exemption must be balanced by increased assessments on others.

Green Acre Baha'i Institute v. Town of Eliot, 193 A.2d at 566. Here, that extra burden is shouldered by local property tax payers and other Maine taxpayers through state subsidies for education[25] as well as through state-municipal revenue sharing.[26]

Property tax exemptions for charities have a special role and special characteristics which distinguish them from other types of exemptions that have been analyzed by this Court. First, exemptions for charities are not designed to confer competitive advantages to in-state

---

[24] **36 M.R.S.A. § 196. Tax Expenditure**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Tax expenditure. "Tax expenditure" means provisions of state law which result in a reduction of tax revenue due to special exclusions, exemptions, deductions, credits, preferential rates or deferral of tax liability.

[25] 20-A M.R.S.A. § 15601 *et seq.* See *School Administrative District No. 1 v. Commissioner, Department of Education*, 659 A.2d 854 (Me. 1995).

[26] 20-A M.R.S.A. § 5681 *et seq.*

economic interests.[27] Cf. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (exemption from liquor excise tax for certain types of domestic liquors violates dormant Commerce Clause because it has both the purpose and effect of discriminating in favor of local products). Instead, they are awarded in recognition of the value to society of the work done by the charitable organization. Second, exemptions for charities pertain to real and personal property taxes which are broad based and nondiscriminatory. Every nonexempt property owner, corporation or individual, resident or nonresident, must pay the tax levied. Since the exemption shifts the burden of lost taxes to the remaining property owners, the effects of the exemption are also broad based and nondiscriminatory. Cf. *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994) (subsidy program funded primarily by tax on sale of out-of-state milk and not out of general revenue violates the Commerce Clause). Third, exemptions for charities are granted in return for a service. They are part of a *quid pro quo*. This is unlike exemptions intended to promote the competitive position of certain for profit businesses.

Courts have typically justified the granting of real estate tax exemptions based upon the recipient charitable organization's either (1) relieving the government of a fiscal burden it would otherwise assume or (2) conferring

---

[27] These distinctions were alluded to by the Law Court below. Pet. 6a. Contrary to the petitioner's assertions (Pet. Br. 39, *et seq.*), the respondents do not contend that the nonprofit sector of the economy is unprotected by the Commerce Clause. It is the treatment of property tax exemptions for nonprofits under the Commerce Clause which the respondents contend is distinctive.

a benefit upon the general public through the social good which the charitable organization promotes. See, *e.g.*, *Utah County v. Intermountain Health Care, Inc.*, 709 P.2d 265 (Utah 1985); *Electric Power Research Institute, Inc. v. City and County of Denver*, 737 P.2d 822, 830 (Col. 1987) (concurring opinion). A leading text on the topic of taxation of charities, supported by references to many state court opinions, explains:

> Exemption of charitable property flows from the concept that property used for public activities and functions should not be taxed. Hence it follows that because charitable property renders a public service and is used for public functions it should be tax exempt. Formulated in terms of the so-called governmental theory of tax exemption, private charities perform functions that the state would be required to undertake and tax exemption is granted as a *quid pro quo* for the performance of these functions and services. Many courts expand the governmental doctrine into the humanitarian theory under which tax exemption is justified not only for the performance of functions which relieve the state of its burden but also for activities which further socially desirable objectives considered of benefit to the community. (Footnotes omitted.)

Fisch, *et al.*, *Charities and Charitable Foundations* § 787 at 602-603 (1974). See also W. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 Temp. L. Q. 291 (1980) and cases cited therein; Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 Harv. L. Rev. 288, 288-289 (1950). Some courts have observed that without this *quid pro quo* – tax exemption in return for relieving a

public burden/conferring a public benefit – property tax exemptions would violate the principle of equal taxation and would be nothing more than a gift of public funds at the expense of the nonexempt taxpayer. See *Kimberly School v. Town of Montclair*, 60 A.2d 313 (N.J. 1948).

As previously noted, this Court has not had occasion to review a property tax exemption for charities under the dormant Commerce Clause. When analyzed, exemptions for charities such as the exemption statute should be upheld under either the market participant exception to the dormant Commerce Clause or as direct governmental subsides from the general fund not subject to the Commerce Clause.[28]

A. The State is a "Market Participant."

The expenditures which exemptions for charities represent can be viewed as "purchases" of services through a tax exemption. The purchase is funded by all nonexempt taxpayers, just as any purchase of goods or services by the government is funded. It makes no economic difference to the taxpayer whether his or her money is actually paid to the charities or is used by the municipality to replace tax money lost through exemption of those charities. Further, it makes no economic difference to the charity whether it receives money from the municipality to pay its taxes or is relieved from the obligation of paying taxes.

---

[28] The petitioner has characterized the market participant exemption as "simply irrelevant." Pet. Br. 34.

The services purchased are those things that the charity does in carrying out its mission. It might be feeding the homeless at a "soup kitchen," providing transportation to the elderly or, as with the petitioner, helping "children to grow spiritually, mentally and physically . . . and thereby to become good citizens in society as adults." Pet. Br. 2. What services the State will purchase with exemption dollars is a legislative decision. From whom the State will purchase those services is also a legislative decision. It is, of course, this latter point which is at issue in the instant case.

State and local governments may choose to do business solely with in-state providers of goods and services without running afoul of the dormant Commerce Clause. This Court has held that when state and local governments participate as buyers in the market place, the choices they make do not invoke Commerce Clause scrutiny because the governmental units are not regulating markets, they are participating in them as consumers. For example, in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), this Court upheld a Maryland program in which the State paid a bounty for Maryland titled junk cars converted to scrap. (The State never took title to the hulks.) When the State enacted regulations which made participation in the bounty program more difficult for out-of-state scrap processors than for those in Maryland, the out-of-state processors challenged the regulations under the Commerce Clause. This Court upheld the program and observed that the bounty program did not involve the kind of action with which the Commerce Clause is concerned:

> But no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their [car hulks] movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others. (Footnotes omitted).

Id. at 809-810. Maryland had become a market participant by becoming "a purchaser, in effect, of a particular article of interstate commerce," *i.e.*, car hulks, and by bidding up the price through the bounty system. See also *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (upholding law restricting sales from state owned cement plant to state residents and observing that the Commerce Clause does not prevent a legislature from "fashioning . . . effective and creative programs for solving local problems and distributing government largesse").

In *White v. Massachusetts Council of Construction Employees*, 460 U.S. 204 (1983), the Mayor of Boston issued an executive order requiring that construction projects in Boston funded in whole or in part with City money be built by contractors with a work force consisting of at least fifty percent Boston residents. This Court upheld the order, finding that Boston was a market participant rather than a market regulator:

> If the City is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the City demands

> for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the City is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.

Id. at 210.

The exemption provided by Maine's exemption statute is analogous to the types of market participation that have been upheld by this Court and found not to invoke a Commerce Clause analysis. The statute's purpose is to make tax expenditures which relieve the State from some of its burden of providing social services and is entirely consistent with the "governmental theory" of tax exemptions for charities. See Fisch, *et al., Charities and Charitable Foundations, supra*. Since that burden is primarily with respect to Maine residents, it is not surprising that the State chooses to purchase charitable services from exempt organizations that will serve primarily Maine residents. This Court's observation in *Reeves, Inc. v. Stake, supra*, is especially apt:

> The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps

> "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government – to serve the citizens of the State.

447 U.S. at 442.

B. Property Tax Exemptions For Charities Are Subsidies.

Maine's statutory and case law treatment of tax exemptions as expenditures may also be analogized to subsidization of private sector business with public funds which the petitioner concedes would be approved by this Court. Pet. Br. 31. With respect to the nonprofit sector, the taxpayers subsidize the qualifying charity so that it can expend its funds on charity – relieving a public burden/conferring a public benefit – rather than on payment of taxes.

This Court has recently observed that: "A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. at 2214. The petitioner, in fact, recognizes that "subsidies to charitable institutions related in some way to their service to residents" would be constitutionally permissible. Pet. Br. 31.

The exemption statute places a tax burden on the nonexempt property owners of Harrison by shrinking the Town's tax base. They must make up the revenue lost to the Town budget because of exemptions from the property tax. School funding and municipal revenue sharing also mean that, to some extent, all Maine taxpayers who

contribute to the State's general fund through income and other taxes also pay for the exemption. Whether cast as an exemption or a subsidy, the effect on Harrison's taxpayers is the same, *viz.*: They pay more in taxes than they would without the exemption. If the exemption statute were replaced with one of the so-called "reasonable and adequate alternatives" – vouchers, direct payments and scholarships – suggested by the petitioner as being constitutionally permissible (Pet. Br. 30-31), the result would be the same as it is under the exemption statute: Each of the petitioner's alternatives is a subsidy to either the consumer of the charitable service or the provider of the service. The subsidy must be funded by tax monies raised from nonexempt properties just as the exemption is "funded."

The exemption statute effects a subsidy for certain charitable organizations and should be regarded as the equivalent of a subsidy for purposes of dormant Commerce Clause analysis. The fact that the State has chosen which organizations to subsidize through the exemption statute, *i.e.*, that it has discriminated, does not mean that it has violated the dormant Commerce Clause.

C. The State is Not Obligated to Subsidize the Tuitions of Nonresidents.

The market participant exception and the subsidy discussed in this portion of the Brief are related concepts. Under either construct, government money enters the market place and has an influence on the market. The petitioner may argue that tax exemptions have been viewed by this Court as the equivalent of a tax, not the

purchase of services or the subsidization of business from the general fund, and may point to *Bacchus Imports, Ltd. v. Dias, supra,* to support its position. *Bacchus Imports* did treat the exemption from an excise tax as the functional equivalent of a tax designed to advantage in-state business interests to the detriment of out-of-state business interests. However, as already discussed, a charitable exemption is very different. Its purpose is not to advantage an in-state economic interest but, rather, to secure charitable services for the public. There is a *quid pro quo* with tax exemptions for charities that is not present with tax exemptions for profit making businesses.

In *Alexandria Scrap, supra,* Justice Stevens wrote a concurring opinion which provides a helpful analysis for tax exemptions such as those at issue here. Justice Stevens pointed out that there is an important distinction for Commerce Clause purposes between free enterprise markets and those effectively created by the participation of the government:

> It is important to differentiate between commerce which flourishes in a free market and commerce which owes its existence to a state subsidy program.

426 U.S. at 815. He went on to observe:

> That commerce, which is now said to be burdened, would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants. A failure to create that commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business. Nor, in

> my judgment, does that Clause inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.

Id. at 815-816.

In the instant case, the petitioner is complaining that it is not being allowed into the market of tax exempt nonprofit camps and, as a result, that its campers pay higher tuition and get fewer services than they would if the petitioner were in that market. In other words, the petitioner complains that its campers are not being subsidized by the State. But the market of tax exempt nonprofit camps exists only because the State has, through the exemption mechanism, entered the market. The State has created that market but, in so doing, has not obligated itself to subsidize the tuition of nonresident campers.

III. CONGRESS MAY NOT TAX REAL ESTATE AND THE EXEMPTION STATUTE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE IT DOES NOT INTRUDE INTO AN AREA OF CONGRESSIONAL AUTHORITY.

A. Congress Has Only Limited Authority Under the Commerce Clause.

The Commerce Clause is a broad grant of authority by the People to Congress to regulate commerce among

the several States. U.S. Const. art I., § 8, cl. 3. The authority granted "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *United States v. Lopez*, 115 S. Ct. 1624, 1627 (1995) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

The authority of Congress under the Commerce Clause is not, however, unlimited. As Chief Justice Marshall wrote in *Gibbons v. Ogden*, those limits are prescribed in the Constitution itself. One source of limitation is in the language of the Commerce Clause. Congress may only "regulate Commerce . . . *among the several states* . . . ." U.S. Const. art I, § 8, cl. 3. (emphasis added). What constitutes "Commerce" as well as what constitutes "interstate commerce" have been the subject of numerous opinions of this Court. See *United States v. Lopez*, 115 S. Ct. at 1634-1642 (Kennedy, J., concurring.)

Further limitations on the authority of Congress under the Commerce Clause are found in other provisions of the Constitution. It is certain of these other Constitutional provisions which are of concern here.

B. Taxes on Real Estate are Direct Taxes Beyond the Authority of Congress.

One constitutional provision that restrains Congressional power under the Commerce Clause is Article I,

Section 9, Clause 4, which limits the Congressional power of taxation:[29]

> No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

U.S. Const. art I, § 9, cl. 4.

Further statement of this limitation is found in Article I, Section 2, Clause 3:

> [D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .

U.S. Const. art I, § 2, cl. 3.

The key term in these provisions is "direct tax" and the central question is whether it includes taxes on real estate.

This Court grappled with the meaning of "direct tax," as used in Article I, in several cases decided during the nineteenth century. Perhaps the definitive treatment of what is a "direct tax" is found in *Springer v. United States*, 102 U.S. 586 (1880). In *Springer*, the central

---

[29] The power of taxation is found in Article I, Section 8, Clause 1:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . . .

U.S. Const. art I, § 8, cl. 1.

question presented was whether the income tax at issue was a "direct tax." *Id.* at 592. The Court reviewed in detail the history of the direct tax language in the Constitution. *Id.* at 595-599. In the end, the Court concluded:

> [D]irect taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate . . . .

Id. at 602. The Court thus found that a tax on real estate is a direct tax.[30]

It may be argued that the precise limitation of the Constitution is that real estate taxes may not be enacted unless they are apportioned among the States according to the Census and that this does leave open the possibility that Congress could impose real estate taxes, notwithstanding that they are direct taxes. While the letter of the constitutional provisions relating to taxes would seem to admit of this possibility, the results of apportioning real estate taxes would violate other constitutional provisions.

The issue of apportioning direct taxes was discussed in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1756). That case involved a challenge to a federal tax on "pleasure-carriages" on the grounds that it was a direct tax that had not been apportioned among the States. Each of the four Justices who heard the case issued a separate opinion upholding the tax. Justice Chase wrote the lead opinion and the other Justices wrote concurring opinions. In his

---

[30] Ultimately, the Sixteenth Amendment resolved the constitutional issue about taxes on all income, "from whatever source derived."

opinion, Justice Chase commented upon the "great inequality and injustice" that would result if taxes on individual articles, *e.g.*, carriages, were apportioned and concluded that "it is unreasonable to say, that the Constitution intended such tax should be laid by that rule." *Id.* at 174. In his concurring opinion, Justice Paterson[31] explained the political reasons for the apportionment requirement attached to direct taxes:

> The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves . . . and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause to the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.

Id. Justice Paterson then went on to discuss the many difficulties that would be encountered if the federal government ever tried to tax real estate and observed that it would not be likely to be any more successful than the "requisition" upon the states during the confederation. *Id.* at 178.

The issues of fundamental fairness raised by apportioning a federal tax on personal property, as alluded to by Justice Chase in *Hylton*, are also present in apportioning a federal tax on real estate. The federal government

---

[31] Both Justices Chase and Paterson had been members of the Constitutional Convention. *Springer v. United States*, 102 U.S. at 599-600.

would need to place a value on each parcel of land to be taxed. (This might or might not be the same as the values now used by local governments. The difficulties inherent in this were addressed by Justice Paterson in *Hylton*.) It would then need to calculate the taxes to be raised from a tax on the real estate in each State assessed based upon the population and the total value of real estate within each State. This would result in real estate located in a State with little land and a large population being taxed at a much higher rate (dollars per acre) than, for example, equivalent real estate in a State with a large land area and a small population. The tax would have little to do with the quality of the land itself or with its "fair market value" and, instead, would be determined by the population and geography of the State in which it is located. Such a system would raise insurmountable due process, equal protection and privileges and immunities problems.

There is no national real estate tax today. There has not been a federal real estate tax since before the Civil War. An authority on federal taxation has made the following observation:

> Congress could easily apportion a fixed-amount poll tax among the states in proportion to population; but apportionment of other types of taxes would require a different rate for every state in order to insure that the aggregate amount paid by each state was proportional to its population rather than to the value of the taxable items within its borders. As a practical matter, therefore, apportioned taxes have not been levied by Congress for more than a century.

B. Bitker, *Federal Income Taxation* ¶ 1.1 at 1-2 (2d ed. 1995).[32]

Thus, an unapportioned tax on real estate violates the letter of the United States Constitution and is, therefore, beyond the authority of Congress. If Congress attempted to apportion a real estate tax, it could not do so without creating gross inequities that would offend the principles of due process and equal protection and would violate the Privileges and Immunities Clause. In any event, Congress cannot enact an *ad valorem* property tax, *i.e.*, one based strictly upon a "fair market value" assessment, such as the municipal property tax at issue in the instant case.

C. Since Congress Cannot Impose a National Real Estate Tax, State Real Estate Taxes and Exemptions Therefrom Cannot Violate the Dormant Commerce Clause.

As discussed above, the Commerce Clause is a grant of authority to Congress. The dormant Commerce Clause protects that Congressional authority. When the States exercise their taxing authority, they must do so in a manner that does not interfere with Congressional authority and, thereby, violate the dormant Commerce Clause. This Court has expressed the proposition thus:

---

[32] The Court's opinion in *Springer*, *supra*, lists several acts of Congress between adoption of the Constitution in 1789 and 1861 which imposed a direct tax. The acts imposed the tax on real estate and slaves. None of these enactments was tested by the Court.

> Section 8, clause 3, article 1 of the Constitution declares that 'Congress shall have Power To regulate Commerce with foreign Nations, and among the several States.' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. (Citations omitted.)

McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 45 (1940).

Here, the taxation of real estate is a direct tax which is beyond the authority of Congress under the Commerce Clause or any other provision of the Constitution unless it is done with apportionment based on population. The States, therefore, are not infringing on the authority of Congress under the Commerce Clause when they, through their municipalities, impose unapportioned *ad valorem* taxes on real estate or enact, as part of their regime of real estate taxation, exemptions therefrom.

The exemption statute, which is an integral part of Maine's system of unapportioned real estate taxation, cannot be found to violate the dormant Commerce Clause because it does not infringe upon the authority conferred upon Congress. This, of course, is not to say that the statute escapes Constitutional scrutiny. It is subject to examination under the Equal Protection and Due Process provisions of the Fourteenth Amendment and under the Privileges and Immunities Clause. The Law Court held,

and the petitioner concedes, that the exemption statute meets those tests.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted,

WILLIAM L. PLOUFFE
DRUMMOND WOODSUM &
MACMAHON
245 Commercial Street
Post Office Box 9781
Portland, Maine 04104-5081
(207) 772-1941
Counsel for Respondents

June 12, 1996

(9)

No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

PETITIONER'S REPLY BRIEF

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

July 17, 1996

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTION:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 94-1988

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

PETITIONER'S REPLY BRIEF

I. INTRODUCTION

In their brief, respondents to a significant degree misconceive the issue, misapprehend petitioner's arguments, and misconstrue controlling decisions of this Court. In this reply, we discuss the parties' arguments under the following principal heads:

First, the issue: On its facts, this case presents the question whether the dormant Commerce Clause imposes *any* significant limits upon a state's exercise of its taxing power so as to discriminate against charities that serve non-residents. It does not present the question as to how far such limits might extend. Here, the charity is a Maine corporation; it conducts all of its charitable activities in Maine; and the taxed facility is dedicated solely to those activities. Thus, the case does not raise the question sometimes addressed by respondents respecting a state's right

to condition the grant of tax exemptions upon the performance of charitable activities within the state.

Second, impact on interstate commerce: Respondents maintain that the statute, while concededly discriminatory, does not burden interstate commerce for two reasons. To begin with, they maintain, correctly, that petitioner's campers are not "articles in commerce" and, incorrectly, that we said they are. Next, as to the argument we *did* advance—that the interstate travel integral to petitioner's service to non-residents constitutes interstate commerce—respondents attempt, unsuccessfully, to distinguish *Edwards* v. *California*, 314 U.S. 160 (1941), and *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964). Respondents also maintain, contrary to this Court's decisions, that evidence of adverse impact on travel is necessary.

Third, the appropriate test: Respondents maintain that, since the tax is a levy on real estate, any impact on interstate commerce is indirect, and that accordingly the "flexible" test, not the *per se* test, applies.

This reliance upon the form of the tax to escape the *per se* test is unavailing under established precedent. And so, too, is respondents' efforts to sidestep our contention that the statute is invalid under any test because constitutionally permissible alternatives were available. Respondents unaccountably dismiss petitioner's suggested alternatives on the notion that, instead of replacing the exemption, they would supplement it. So read, our argument would be foolish. Read properly, it is unanswered.

Finally, market participation and subsidies: Respondents contend, alternatively, that the statute is taken entirely outside the Commerce Clause by this Court's decisions respecting market participation and subsidies. Again, respondents' reading of those decisions is insupportable. Moreover, a decision unnoted by respondents, *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988), forecloses their argument.

We turn now to the detail of our reply.

II. RESPONDENTS MISCONCEIVE THE ISSUE.

In an effort to undermine both our claim that the Maine statute stands almost alone, and also our attack upon that statute, respondents cite three statutes from other jurisdictions claimed to be "similar, though not identical," to § 652(1)(A)(1).[1] Resp. Br. 3 n.4, 26-27. Surely the sparse results of the parties' combined research confirm, rather than vitiate, our contention respecting the general understanding of the reach of the Commerce Clause. Moreover, respondents' evident view that these other laws raise the same issue as § 652(1)(A)(1) reflects an unduly broad view of the question here presented.

Those provisions require that a charity, to one or another extent, dedicate funds or property to charitable activities within the jurisdiction in order to qualify for an exemption—a test that petitioner would pass. Whether a state can require that a charity perform charitable activity in-state to qualify for an exemption is a quite different question from that presented here: Whether a state may deny the exemption to a charity solely because it serves too many non-residents, even though it is a state citizen, provides charitable service only within the state, and dedicates the property in question entirely to that service. Requiring that charitable activities take place in-state may well raise substantial constitutional issues, but it is not necessary to address them here.

---

[1] The statutes are D.C. Code § 47-1002(8), N.C. Gen. Stat. § 105-8(3), and 68 Okla. Stat. § 2887(8). The D.C. statute was enacted by Congress, Pub. L. No. 77-846 § 1(h), 56 Stat. 1089 (1942), and thus is irrelevant, since the dormant Commerce Clause does not restrict Congress.

III. RESPONDENTS' ARGUMENTS RESPECTING IMPACT ON INTERSTATE COMMERCE ARE MERITLESS.

Respondents concede that petitioner's non-resident campers "are consumers crossing State lines to purchase and 'consume' camping services delivered within Maine," and that "[t]here is no doubt that the exemption statute 'discriminates' in the sense that it creates categories of property owners and treats them differently." Resp. Br. 8, 12. Nor do respondents deny that the relevant distinction is the extent to which those owners serve nonresidents.

Nevertheless, respondents maintain that the discrimination does not burden interstate commerce for three reasons: First, the campers are not "articles in commerce." Resp. Br. 17-20. Second, "[n]either *Edwards* v. *California* nor *Heart of Atlanta Motel, Inc.* v. *United States* supports the position that the Commerce Clause protects campers crossing State lines against the alleged effects of the exemption statute." *Id.* at 20. And, third, "the statute is fundamentally about taxation of real estate . . . [and a]ny effect that it has on articles in interstate commerce . . . is secondary and incidental and does not invoke the rule of *per se* invalidity." *Id.* at 24. Under the "more flexible" test, respondents urge, the statute is valid. We now discuss these contentions.

A. While Campers Are Assuredly Not "Articles in Commerce," Their Interstate Travel Is Interstate Commerce.

We have not referred to campers as "articles in commerce," a wholly inapt and, as applied to persons, unfortunate phrase. We pass on, therefore, to the argument we did advance, namely that, as the Court put it in *Edwards*, "it is settled beyond question that the transportation of persons is 'commerce,' within the meaning of [the Commerce Clause]," 314 U.S. at 171-72, or, as the

principle was stated in *Heart of Atlanta*, that interstate commerce "include[s] the movement of persons through more States than one," 379 U.S. at 255-56.

Respondents' efforts to distinguish these decisions fail. As to *Edwards*, respondents believe the Court should have relied upon the Privileges and Immunities Clause rather than the Commerce Clause, as did the concurring Justices.[2] But the Court did not do so, and subsequent decisions have not cast any doubt upon the vitality of *Edwards'* explication of the dormant Commerce Clause. Indeed, *Edwards* was favorably cited in that context as recently as 1992 in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 360 (1992).

Nor is there substance to respondents' suggestion that *Edwards* can be set aside because California's purpose, in contrast to Maine's, was complete exclusion of the targeted nonresidents. Resp. Br. 22. There is no basis in the *Edwards* opinion or in reason for supposing that the result would have been different if the statute had imposed a burdensome, but not prohibitory, tax. The central question there, as here, was whether interstate travel falls within the Commerce Clause, not the degree of encumbrance necessary to constitute a violation.

As to *Heart of Atlanta*, respondents rest upon two asserted distinctions. The first is that the facilities were "essential to the ability of citizens to exercise their right to interstate travel," whereas in the case at bar "the petitioner is not engaged in providing lodging or any other service necessary for interstate travel." Resp. Br. 22-23.

---

[2] In his concurring opinion for himself and two other Justices, Justice Douglas simply "express[ed] no view" as to the Commerce Clause. 314 U.S. at 177. And Justice Jackson, in his separate concurrence, while regarding the Privileges and Immunities Clause as the better rationale, "agree[d] that the grounds of [the Court's] decision are permissible ones under applicable authorities." *Id.* at 181-82.

But it is not credible to suppose that the Commerce Clause extends to discrimination affecting interstate travel when that travel is viewed as a goal itself, but not when viewed as a necessary means to secure a service in another state.[3]

Respondents' second argument relates to the evidence in *Heart of Atlanta* respecting the degree to which discrimination affected interstate travel: "Marginal increases in tuition for petitioner's campers are very different from preventing travelers from using lodging accommodations." Resp. Br. 23. But the statute in question, the Civil Rights Act of 1964, prohibited all discrimination, and the reasoning of the Court did not depend on its extent. *See* 379 U.S. at 258.

B. Section 652(1)(A)(1)'s Adverse Impact on Interstate Commerce Is Sufficiently Predictable and Substantial.

As we pointed out in our initial brief (at 22), this Court has repeatedly declared that a finding that a tax discriminates is sufficient to condemn it without more. Nonetheless, the respondents continue to rely upon the Law Court's finding that " 'there is no evidence that the exemption statute impedes interstate travel.' " Resp. Br. 16, 23.

Respondents disregard the decisions we cited except for one. Respondents acknowledge that "petitioner cites *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848 (1996), for the proposition that no *de minimis* exception to a facially discriminatory tax is recognized by this Court," but attempt to distinguish *Fulton* on the ground that "[t]he record here shows no actual impact on camper choices. All impact must be inferred." Resp. Br. 16 n.15.

[3] Respondents err in claiming that, if interstate travel constitutes interstate commerce, tuition schedules favoring residents at state educational institutions would be outlawed. Resp. Br. 19 n.17. Preferences to state taxpayers in the use of *state-owned* facilities have nothing to do with *Edwards*, *Heart of Atlanta*, or this case and, as respondents correctly note, are doubtless constitutional. *See, e.g.*, *Martinez* v. *Bynum*, 461 U.S. 321, 327-28 (1983).

But that was precisely the situation in *Fulton*, as well as in *Maryland* v. *Louisiana*, 451 U.S. 725, 756-57 & n.28 (1981), and *Associated Industries of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1822 (1994). In each case, the adverse impact was "inferred" from the existence of a tax discrimination rather than from evidence of record.

Moreover, by characterizing the impact solely in terms of the reaction of potential campers, respondents ignore the statute's effect on charities. As we have pointed out (Pet. Br. 16), the statute provides a powerful inducement for charities to limit the number of non-residents they serve to avoid loss of their tax exemptions.[4]

C. Even Apart from Interstate Travel, Other Interstate Aspects of Petitioner's Provision of Service Constitute Interstate Commerce.

As we noted in our opening brief (at 19), we have followed the lead of the Superior Court in focusing upon interstate travel because of the obvious relevance of

[4] Respondents add to their impact on commerce argument the following startling comment:

> "In any event, the Commerce Clause protects out-of-state competitors but does not protect out-of-state consumers. See *Commonwealth Edison Company* v. *Montana*, 453 U.S. 609, 618 (1981) (state severance tax on coal that falls mostly on out-of-state utility consumers is not discriminatory under Commerce Clause)." Resp. Br. 16.

There are many cases, like *Commonwealth Edison*, in which facially *non-discriminatory* laws are upheld even though their impact falls disproportionately upon out-of-state interests. But the Court has repeatedly held that discrimination against out-of-state consumers violates the dormant Commerce Clause. *See, e.g., Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("Economic protectionism . . . may include attempts to give local consumers an advantage over consumers in other States."); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) ("[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.").

Edwards and *Heart of Atlanta*. But, as we also observed, this Court's decisions establish that "[n]either interstate transportation of goods nor of persons is necessary to a dormant Commerce Clause violation," and that "[t]he agreements between the petitioner and the nonresident campers are interstate transactions" that would implicate the Commerce Clause even apart from interstate travel. Pet. Br. 6, 16 n.17.

Respondents evidently disagree, believing that without interstate transportation of "articles in commerce" there can be no dormant Commerce Clause violation. Resp. Br. 17-20. Moreover, respondents understand us to maintain that *any* contract between residents of different states involves interstate commerce regardless of circumstances. Resp. Br. 15 n.14. Because respondents are incorrect on both counts, and in order to avert unwarranted expansion of the issue here presented, we now discuss the impact of § 652(1)(A)(1) on aspects of interstate commerce other than travel.

First, the decisions we have cited (Pet. Br. 16 n.17) establish that dormant Commerce Clause violations need not directly involve the transportation of goods or people. In *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977), the New York tax that was invalidated had imposed a tax on in-state securities transactions which discriminated against transactions involving sales on out-of-state exchanges. Its vice was that "the flow of securities sales"—not tangible articles in commerce—"is diverted from the most economically efficient channels and directed to New York." *Id.* at 336. Nor was there interdiction of "articles in commerce" in *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), where the state law foreclosed out-of-state competitors from the state investment advisory services market.[5]

[5] *See also Fulton Corp., supra* (state "intangibles tax" on stock discriminated against the stock of corporations that did no business in the taxing state).

In the case at bar, it is clear that more is involved than the different state residencies of the contracting parties. Petitioner's camp, with a population of several hundred campers who remain for a number of weeks (J.A. 46), is plainly not a "walk in" facility. Petitioner advertises in other states and "sends its Executive Director annually on camper recruiting trips across the country." J.A. 49-50, 52. In the typical instance, the arrangements leading to execution of the contracts with nonresidents surely involve interstate communications. Accordingly, assuming *arguendo* that the contracts by themselves do not constitute interstate commerce, the chain of events leading to them does, as decisions such as *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), establish.

In that case, the Court rejected the argument that contracts of insurance did not involve interstate commerce because they " 'are not commodities to be shipped or forwarded from one State to another.' " *Id.* at 546. The Court explained that it "examine[s] the entire transaction to determine whether there may be a chain of events which becomes interstate commerce," and that "[n]ot only . . . may transactions be commerce though non-commercial; they may be commerce . . . though they do not . . . concern the flow of anything more tangible than electrons and information." *Id.* at 546-47; 549-50.

Thus, there is here adverse impact on interstate commerce even without regard to interstate travel.

IV. THE FACT THAT § 652(1)(A)(1) IS A REAL ESTATE TAX IS IMMATERIAL.

Respondents maintain that, because the statute imposes a real estate tax, neither the *per se* test nor the Commerce Clause itself is applicable. Resp. Br. 24, 27. These contentions are not sustainable.

A. A Facially Discriminatory Real Estate Tax Is Subject to the *Per Se* Test.

We note preliminarily that respondents' contention respecting the appropriate test presents severe difficulties as

applied to § 652(1)(A)(1), which concerns taxes on both "real estate and personal property." Petitioner's payments included both types. J.A. 57. On respondents' analysis, then, part of the tax would be tested under the *per se* rule and part under the "flexible" rule.

This anomaly evidences the artificiality of the distinction proposed, an artificiality that is evident from respondents' discussion of the decision that applied the dormant Commerce Clause to a discriminatory personal property tax on logs imported from another state, *I.M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908). That decision, respondents maintain, is irrelevant because of the "distinction between real property, which has a fixed location, and personal property, which is movable across state lines." Resp. Br. 9-10. On this theory, the decision in *Darnell* would have been reversed if the discriminatory levy had been a real property tax upon the facilities storing the imported logs rather than a tax upon the logs themselves. This result is insupportable both in reason and under this Court's decisions, which have made it clear that Commerce Clause determinations turn upon substance—the practical effect of statutes—not upon form.

The Court's dismissal of a contention similar to respondents' in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), is instructive. There, the Montana court had concluded that the severance tax in issue (which "[i]n many respects . . . is like a real property tax," *id.* at 624) was "not subject to the strictures of the Commerce Clause." *Id.* at 614. This Court disagreed:

> "The Court has . . . rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity. . . . In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" *Id.* at 615-16 (citation omitted).

Decisions holding taxes invalid as facially discriminatory have also emphasized the immateriality of the form of the tax. Thus, *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984), in striking down a franchise tax measured by aggregate revenues, relied upon prior decisions though they had involved taxes on particular transactions. "It cannot be that a State can circumvent the prohibition of the Commerce Clause" because of a difference in the incidence of the tax. *Id.* at 404. Nor did it matter that the provision was an exemption, for "[w]e have declined to attach any constitutional significance to such formal distinctions that lack economic substance." *Id.* at 405. Most recently, the intangibles tax on stock that was invalidated as facially discriminatory in *Fulton Corp.* was not levied directly on any aspect of interstate commerce, but rather was measured by the amount of in-state business conducted by the corporate issuers of the stock. 116 S. Ct. at 855.

We know of no authority contrary to these decisions, nor do respondents assign any policy reason in support of according real estate taxes immunity from the *per se* rule applicable to all other forms of facially discriminatory taxes.

B. The "Direct Tax" Clause of the Constitution Is Irrelevant.

Whether or not real estate taxes are "direct taxes" within the meaning of Article I, Section 9, Clause 4 of the Constitution, and whether or not they could be apportioned, Congress surely has authority under the Commerce Clause to legislate against real estate taxes that impose undue burdens upon interstate commerce. Even absent such legislation, a state's "power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against [interstate commerce]." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596 (1923). Were it otherwise, states would be provided a shield that could be employed with-

out great ingenuity to achieve discriminatory results otherwise constitutionally barred.

V. SECTION 652(1)(A)(1) IS INVALID UNDER ANY TEST BECAUSE OF THE AVAILABILITY OF CONSTITUTIONALLY PERMISSIBLE ALTERNATIVES.

In our opening brief, we discussed the importance this Court has attached, in both facial and indirect discrimination cases, to the availability of constitutionally acceptable alternatives, and we identified several such alternatives that could have been utilized to achieve the purported goal of the Maine statute, including vouchers issued to residents for the purchase of services or direct payments to charitable institutions to defray residents' fees. Pet. Br. 28-32.[6]

Respondents avoid this argument by miscontruing it. They view our proposed alternatives, not as substitutes for the exemption, but as additions to it, so that "the State or its political subdivision would pay twice." And they observe, quite rightly, that "[i]t seems unlikely that any State would enact such a system." Resp. Br. 30.

But in the decisions we relied upon the Court used the term "alternative" in its ordinary sense as referring to a substitute, not to a supplement, and so did we, as our brief, we had thought, made unmistakably clear. Thus, we explicitly referred to the "replace[ment]" of the tax with alternatives, and to the result: "costs would be increased for those organizations now receiving an exemption." Pet. Br. 30-31.

---

[6] We sometimes used the term "nondiscriminatory alternatives," a phrase often employed by the Court, which is appropriate if taken to mean alternatives that are not invidiously discriminatory. However, the measures we identified would distinguish between residents and nonresidents. Accordingly, other phrases also used by the Court, such as "reasonable and adequate alternatives," *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951), or alternatives "with a lesser impact on interstate activities," *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), are preferable.

Neither the Law Court nor respondents have indicated why the State's legitimate interest could not be adequately secured by such licit alternatives. Indeed, at a later point in their brief, respondents appear to agree that these alternatives would in fact achieve the State's objectives. Resp. Br. 39. Given the availability of alternatives, then, the statute would be infirm even were the "more flexible" test applicable.

VI. NEITHER THE MARKET PARTICIPATION NOR THE SUBSIDY EXCEPTION IS APPLICABLE.

Respondents argue that tax exemptions for charities constitute either "market participation" or a subsidy, and thus are exempted from scrutiny under the dormant Commerce Clause. But to characterize a tax exemption as a subsidy or as involving market participation would permit the exception to replace the rule. It is hard to imagine a discriminatory tax exemption that does not, in a sense, involve a "purchase" or a "subsidy." Thus, if respondents' reasoning were applied to *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), there would be a "purchase" of distributors' patronage of local beverage producers, or a subsidy of those distributors. Similarly, *I.M. Darnell, supra* would involve a "purchase" of the patronage by lumber mills of local timber producers, or a subsidy of such mills. More generally, other cases would involve the "purchase" of the patronage by buyers of local services or products, or the subsidy of the suppliers of those services or products.[7] The purposes cannot be faulted, and are no less legitimate than those reflected by § 652(1)(A)(1). It is the means—discriminatory taxes—that have consistently been condemned.

Moreover, the First Amendment implication of respondents' contention discloses its infirmity. If Maine is purchasing recreational services or subsidizing camps through the exemption for their property, then it is also purchasing

---

[7] *E.g., Westinghouse Elec., supra; Boston Stock Exch., supra; H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525 (1949).

religious services and subsidizing churches under the companion exemption for "houses of religious worship," Me. Rev. Stat. Ann. tit. 36, § 652(1)(G). The price of saving one exemption from the Commerce Clause would be condemnation of another under the First Amendment, since this Court's ratification of tax exemptions under that Amendment would be inapplicable.[8]

More particularly, the infirmities in respondents' arguments are these:

A. The Statute Reflects Governmental Action, Not Market Participation.

The Maine law does not involve "market participation" as that term has been employed in the three decisions upholding laws on the basis of this doctrine. Rather, as we will show, it is precisely the type of statute held *not* to involve market participation in *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988).

Under the market participation doctrine, states are free from the limits of the Commerce Clause "when acting as proprietors," so that they may "share [with private market participants] existing freedoms from federal constraints." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 (1980). As to this issue, there is "a single inquiry: whether the challenged 'program constituted direct state participation in the market.'" *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983). In each of the market participation cases, the state (or political subdivision) bought or sold specific goods—cement from a state-owned plant in *Reeves*, a building in *White*, and automobile "hulks" in the seminal case, *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

In contrast, Maine is not, through the tax exemption, buying anything from anyone for anyone. There are no

[8] *See Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.").

contracts of sale or purchase. Maine does not join, *e.g.*, campers or nursing home residents as a participant in the market for those services. Rather, Maine acts as a government.

New Energy Co. of Indiana confirms this conclusion. There, the Court struck down an Ohio statute granting a fuel sales tax credit for the use of ethanol produced either in Ohio or in any other state granting a reciprocal benefit to Ohio ethanol. The state was "purchasing," *i.e.*, encouraging, the production of ethanol by Ohio producers in the same way in which Maine is "purchasing" the provision of charitable services. But the Court ruled:

> "The market participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity." 486 U.S. at 277.

This decision forecloses respondents' contention.

B. Tax Exemptions Are Not Equivalent to Subsidies.

Respondents argue that § 652(1)(A)(1) "may also be analogized to subsidization." Resp. Br. 38. But, as we have pointed out, this Court has repeatedly treated discriminatory tax exemptions and credits as equivalent to discriminatory taxes, not as constitutional subsidies. Pet. Br. 23-24.[9]

Again, *New Energy Co. of Indiana* is dispositive. The plaintiff was an Indiana ethanol producer that was itself the beneficiary of a direct subsidy from Indiana. Neither this apparent irony nor the functional similarity between the Ohio exemption and the Indiana subsidy saved the Ohio statute.

[9] *See also West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205, 2220 (1994) (Scalia, J., concurring) (distinguishing between a "discriminatory 'exemption' from [a] nondiscriminatory tax" and "application of a state subsidy from general revenues").

> ". . . To be sure, the [Ohio] tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market. . . ."
>
> * * * *
>
> "It has not escaped our notice that the appellant here . . . is the potential beneficiary of a [subsidy] scheme no less discriminatory than the one that it attacks . . . . [However,] [d]irect subsidization of domestic industry does not ordinarily run afoul of that [Commerce Clause] prohibition; discriminatory taxation of out-of-state manufacturers does." 486 U.S. at 277-78.

Thus, § 652(1)(A)(1) cannot be saved as the equivalent of a subsidy any more than as the equivalent of market participation, and for the same reason: it is the equivalent of a facially discriminatory tax.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed and the case remanded to that court for appropriate relief.

Respectfully submitted,

Of Counsel
WILLIAM H. DALE
EMILY A. BLOCH
SALLY J. DAGGETT
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
(207) 775-7271

WILLIAM H. DEMPSEY *
ROBERT B. WASSERMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

July 17, 1996

* Counsel of Record

No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,
v.
TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, INDEPENDENT SECTOR, AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN HEART ASSOCIATION, CENTER FOR NON-PROFIT CORPORATIONS, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, DELAWARE ASSOCIATION OF NONPROFIT AGENCIES, MAINE ASSOCIATION OF NONPROFITS, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, NATIONAL COUNCIL OF NONPROFIT ASSOCIATIONS, NATIONAL EASTER SEAL SOCIETY, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NONPROFIT COORDINATING COMMITTEE OF NEW YORK, UNITED WAY OF AMERICA, AND YMCA OF THE USA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CARTER G. PHILLIPS
NATHAN C. SHEERS
MARISA A. GÓMEZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

SHELDON ELLIOT STEINBACH *
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036-1193
(202) 939-9355

Counsel for Amici Curiae

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

May 10, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3177

AMERICAN ASSOCIATION
OF MUSEUMS
1225 Eye Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 289-1818

AMERICAN HEART ASSOCIATION
7272 Greenville Avenue
Dallas, TX 75231-4596
(214) 373-6300

CENTER FOR NON-PROFIT
CORPORATIONS
15 Roszel Road
Princeton, N.J. 08540
(609) 951-0800

COUNCIL FOR ADVANCEMENT AND
SUPPORT OF EDUCATION
11 Dupont Circle, N.W.
Suite 400
Washington, D.C. 20036
(202) 328-5900

DELAWARE ASSOCIATION OF
NONPROFIT AGENCIES
100 W. 10th Street
Suite 102
Wilmington, DE 19801
(302) 777-5500

MAINE ASSOCIATION OF
NONPROFITS
565 Congress
Suite 301
Portland, ME 04101
(207) 871-1885

NATIONAL ASSOCIATION OF
INDEPENDENT COLLEGES
AND UNIVERSITIES
1025 Connecticut Avenue
Suite 700
Washington, D.C. 20036
(202) 785-8866

NATIONAL ASSOCIATION OF
INDEPENDENT SCHOOLS
1620 L Street, N.W.
Washington, D.C. 20036-5605
(202) 973-9700

NATIONAL COUNCIL OF
NONPROFIT ASSOCIATIONS
1001 Connecticut Ave., N.W.
Suite 900
Washington, D.C. 20036
(202) 833-5740

NATIONAL EASTER SEAL SOCIETY
230 W. Monroe
Chicago, IL 60606
(312) 726-6200

NONPROFIT COORDINATING
COMMITTEE OF NEW YORK
121 Avenue of the Americas
New York, NY 10013-1510
(212) 925-5340

YMCA OF THE USA
101 N. Wacker Drive
Chicago, IL 60606
(312) 977-0031

ADAM YARMOLINSKY
INDEPENDENT SECTOR
1828 L Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-8100

SUSAN B. HARRIS
NATIONAL MULTIPLE
SCLEROSIS SOCIETY
733 3rd Avenue
New York, NY 10017
(212) 986-3240

CHARLES E. M. KOLB
UNITED WAY OF AMERICA
701 N. Fairfax Street
Alexandria, VA 22314
(703) 836-7100

QUESTION PRESENTED

Whether a Maine statute, Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1), violates the Commerce Clause because it deprives "benevolent and charitable" nonprofit institutions of otherwise available property tax exemptions if they are "conducted or operated principally for the benefit of persons who are not residents of Maine."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

CONSTITUTIONAL PROVISION

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1988

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, INDEPENDENT SECTOR, AMERICAN ASSOCIATION OF MUSEUMS, AMERICAN HEART ASSOCIATION, CENTER FOR NON-PROFIT CORPORATIONS, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, DELAWARE ASSOCIATION OF NONPROFIT AGENCIES, MAINE ASSOCIATION OF NONPROFITS, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, NATIONAL COUNCIL OF NONPROFIT ASSOCIATIONS, NATIONAL EASTER SEAL SOCIETY, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NONPROFIT COORDINATING COMMITTEE OF NEW YORK, UNITED WAY OF AMERICA, AND YMCA OF THE USA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The American Council on Education ("ACE") is the nation's major coordinating body in postsecondary education. Founded in 1918, ACE is a voluntary membership organization comprised of more than 1,800 institutions of higher education from both the public and private sectors and more than 175 nonprofit educational associations and organizations. As an association representing the interests of most of the nation's nonprofit higher education institutions and organizations, ACE is uniquely qualified to present the views of such nonprofit institutions in legal matters of national importance which affect their financial interests and mission priorities.

The Independent Sector ("IS") is a nonprofit organization which seeks to ensure the continuance of a healthy, independent nonprofit sector. Founded in 1980 by a merger of the Coalition of National Voluntary Organizations and the National Council on Philanthropy, IS's membership is made up of over 800 not-for-profit corporations, foundations, and voluntary organizations. Because of IS's extensive and well-respected research on the not-for-profit sector and the great diversity of its membership, it is uniquely positioned to speak to the concerns and financial interests of not-for-profit organizations generally.

The American Association of Museums ("AAM") is a nonprofit organization dedicated to promoting excellence within the museum community. Founded in 1906, AAM is the only organization representing the entire scope of museums as well as the professionals and nonpaid staff who work for and with museums. AAM counts among its more than 14,000 members art, history, science, military, maritime, college, university, and youth museums; art associations and centers; historic houses and societies; preservation projects; zoos; planetariums; aquariums; botanical gardens; arboretums; libraries; and science and technology centers. AAM is particularly concerned by this case because many of its members currently are develop-

ing programs and events which are intended to draw a large amount of cultural tourism from other states and countries.

The American Heart Association ("AHA") is a nonprofit voluntary health agency dedicated to reducing disability and death from cardiovascular diseases and stroke. Founded in 1924, the AHA represents more than four million volunteers. The AHA and its 53 affiliates support research, education, and community service programs nationwide. In addition, the AHA ships a number of its publications and licenses many products across state lines.

The Center for Non-Profit Corporations (the "Center") is a charitable umbrella organization representing and serving New Jersey's charities through advocacy, public policy, legal and management consultation, research, and education. Founded in 1982, the Center has over 600 nonprofit members statewide, some of which operate outside the State of New Jersey as well. The Center is dedicated to building the power of the nonprofit sector to improve the quality of life for the people of New Jersey. The Center's mission is based upon the belief that all nonprofits, regardless of which state's citizens those organizations primarily benefit, are important parts of a vital sector which strengthens society as a whole, and that New Jerseyans benefit in countless ways from the presence and work of a strong, vibrant nonprofit community, whether programs or services are provided within the state or elsewhere.

The Council for the Advancement and Support of Education ("CASE") is a nonprofit organization which represents the interests of more than 2,900 public and private colleges and universities, independent elementary and secondary schools, other education-related nonprofit organizations, and commercial firms in the fields of philanthropy, communications, and alumni administration. Founded in 1974 through a merger of the American Alumni Council and the American College Public Rela-

tions Association, CASE provides its services to members across state lines, helps its members solicit funds across state lines, and acts as a national clearinghouse for corporate matching gift information. Moreover, many of CASE's nonprofit members have a substantial number of out-of-state students and alumni.

The Delaware Association of Nonprofit Agencies ("DANA") is a nonprofit association committed to increase the effectiveness of nonprofits located in Delaware. Founded in 1986, its members include more than 235 charitable organizations statewide who provide a number of valuable services both inside and outside of the State of Delaware. DANA is concerned that the effectiveness of a number of its members who operate outside the State of Delaware and Delaware nonprofits as a whole could be affected by the Court's decision here.

The Maine Association of Nonprofits (the "Association") is a nonprofit organization dedicated to advancing and promoting the entire nonprofit sector in the State of Maine. To this end, the Association provides its members with training, education, services, and products designed to aid Maine nonprofits in performing their missions. Founded in 1994, the Association has over 200 nonprofit members and 40 commercial supporters. The nonprofit members of the Association provide a wide variety of services, including health, environmental, and cultural services. These services may be provided across state lines or carried out in association with a national nonprofit organization. Moreover, the Association is concerned that the nonprofit sector of Maine as a whole may suffer should the decision below be allowed to stand.

The National Association of Independent Colleges and Universities ("NAICU") is the nation's primary advocate for private higher education. Founded in 1976 by college and university presidents, working together with representatives of state associations of independent colleges and universities, NAICU currently represents more than 875 private, nonprofit colleges and universities nation-

wide. The 1,600 independent colleges and universities in the United States enroll 2.9 million students, many of them from states other than the state in which the particular independent college or university is located. Independent colleges and universities often solicit funds from donors across state lines as well.

The National Association of Independent Schools ("NAIS"), a nonprofit organization, is the nation's institutional advocate for independent precollegiate education institutions that are primarily supported by tuition, charitable contributions, and endowment income. Founded in 1962 through a merger of the Independent Schools Education Board and the National Council of Independent Schools, the over 1,100 accredited nonprofit members of NAIS include day and boarding schools as well as coed and single-sex schools, each with a distinct mission and an independent board of trustees. Many of NAIS's member schools, most particularly boarding schools, currently serve a sizeable number of out-of-state students. In addition, in many large metropolitan areas—such as Maryland, Virginia, and the District of Columbia, and New York, New Jersey, and Connecticut—day students commute across state lines to attend member schools. NAIS is particularly concerned that in order to maintain their state tax exemptions, member boarding schools will be forced to limit the number of out-of-state students accepted for admission, thereby decreasing the schools' geographic diversity and limiting the educational opportunities available to out-of-state residents.

The National Council of Nonprofit Associations ("NCNA"), founded in 1989, is a charitable organization whose mission is to advance the vital role and capacity of the nonprofit sector in civil society. To accomplish this mission, the NCNA supports and gives voice to state and regional associations of community-based organizations and other nonprofits. Its membership includes over 30 statewide and regional associations of nonprofit organizations. A number of the organizations who are

members of its member associations, as well as the associations themselves, may provide a wide variety of necessary nonprofit services across state lines or be associated with a national organization. The NCNA is concerned that its members, as well as the nonprofit sector as a whole, may be impacted greatly by the Court's decision in this case.

The National Easter Seal Society ("NESS") is a nationwide nonprofit organization which seeks to help people with disabilities achieve independence. Founded in 1919, the NESS provides quality rehabilitation services, technological assistance, and disability prevention, advocacy, and education programs. The NESS has over 135 affiliated societies as members who operate nearly 500 sites, providing necessary services to the communities where they are located. These societies serve one million children and adults with disabilities and their families nationwide, often across state lines. Moreover, the NESS itself serves its societies and members across the United States.

The National Multiple Sclerosis Society ("NMSS"), a nonprofit voluntary health organization founded in 1946, is the nation's most comprehensive resource on multiple sclerosis and related topics. Through its national office and its 50-state network of 135 chapters and branches, the NMSS serves some half-a-million people across the nation annually. The NMSS and its affiliates fund research, provide services, encourage education, and promote public policy development and advocacy on multiple sclerosis issues across state and national borders. This year alone the NMSS spent more than $14 million to support research nationally and internationally.

The Nonprofit Coordinating Committee of New York ("NPCC") is a nonprofit organization that works to improve the political, regulatory, and economic infrastructure that is needed for the 19,500 nonprofits located in the New York City metropolitan area to advance their missions effectively. Founded in 1984, the NPCC's

membership is comprised of over 725 nonprofit members working in the fields of social services, religion, philanthropy, the arts, health care, education, and public policy research, often across state lines. If forced to provide services only within state boundaries, the NPCC fears that a number of its members may not be able to advance their missions effectively.

The United Way of America ("United Way"), founded in 1918, is a national service and training center providing resources, technical assistance, corporate relations, research, and government relations to approximately 2,000 community-based United Way organizations. Apart from government, United Ways support the greatest variety of health and human services in the country, helping to provide such crucial services as disaster relief, emergency food and shelter, job training, crisis intervention, day care, physical rehabilitation, and youth development. The United Way provides services to its community-based United Ways across the nation.

The YMCA of the USA is a nonprofit corporation whose members are the more than 950 local corporate YMCAs which serve over 14 million Americans each year. YMCAs have been building body, mind, and spirit since 1851. They are America's largest nonprofit provider of school-age child care. Hundreds of thousands of children and young people participate in YMCA youth sports, aquatic programs, outreach programs, and camps. And YMCAs continue to be the national leader in providing community-based health and fitness programs for adults of all ages. Many YMCAs serve people who are not residents of the state where the YMCA facility is physically located. Several YMCAs near state borders have service areas that include parts of two, or even three, states. In addition, many of the more than 300 YMCA residential summer camps draw young people from more than one state. Moreover, some YMCA residence programs serve runaway youth or other transient, nonresident

homeless populations. The Armed Services YMCAs and YMCAs located near military bases also serve substantial numbers of people who are not residents of the state where the YMCA is located.

In the decision under review by this Court, the Maine Supreme Judicial Court held that the State's denial of property tax exemptions to nonprofit institutions " 'in fact conducted or operated principally for [the benefit of] persons who are not residents of Maine' " did not violate the Commerce Clause. Pet. App. at 2a (quoting Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1) (West Supp. 1994)). *Amici* have an acute concern in this case. Respondents have urged the Court to adopt the position that Maine's tax exemption statute does not violate the Commerce Clause because "[t]he purpose and effect of tax exemptions for nonprofit *vis-a-vis* for-profit organizations is of key importance" to the determination of whether Maine's denial of the exemption to certain nonprofits discriminates against interstate commerce. Opp. at 9.

Amici Curiae and their member not-for-profit organizations have a special and profound interest in tax exemptions and support the position of petitioner Camps Newfound/Owatonna in urging reversal of the judgment of the Maine Supreme Judicial Court. If allowed to stand, the decision below poses a substantial threat to the financial welfare of nonprofit institutions generally. States following Maine's lead could force educational institutions and other nonprofits to forgo otherwise available tax exemptions simply because they primarily benefit out-of-state residents.

It is the position of *Amici* that states cannot discriminatorily exclude not-for-profit organizations providing benefits across state lines from otherwise available tax exemptions without violating the Commerce Clause. *Amici* in support of petitioner will not reiterate the manner in which laws discriminating against interstate commerce violate the Commerce Clause under this Court's precedents. Rather, *Amici* wish to present their views concerning whether not-for-profit institutions engage in or substantially affect interstate commerce and are therefore entitled to the protections of the Commerce Clause. *Amici* also wish to assist the Court in understanding the harmful effects the decision below will have on nonprofits and the national economy if allowed to stand. *Amici* believe that their distinct perspective and insight on these issues will materially assist the Court in deciding this case.[1]

SUMMARY OF ARGUMENT

This Court has applied the term "interstate commerce" to for-profit and not-for-profit businesses alike and the Court has explicitly recognized that financial motivation alone does not prevent a business from being engaged in or from affecting interstate commerce. Addressing questions arising under the National Labor Relations Act, the Court recognized that the National Labor Relations Board's power to regulate employers, a delegation exercised pursuant to Congress's power to regulate "interstate commerce," encompassed nonprofit institutions. *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944); *Associated Press* v. *NLRB*, 301 U.S. 103, 128-29 (1937). This Court similarly has held that nonprofit entities are subject to antitrust liability under the Sherman Act. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787-88 (1975). The effect of not-for-profit entities on "interstate commerce" is no different under the Commerce Clause when it is dormant.

In fact, the Court has recognized that the meaning of "interstate commerce" is no different when the Court is applying the Commerce Clause in its dormant state than

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

when it is determining whether a matter falls within the ambit of congressional authority. *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 621 (1978). Accordingly, the Court's rulings interpreting the sweep of Congress's power under the Commerce Clause inform what "interstate commerce" is when the Commerce Clause is dormant. While the Court has not directly addressed whether nonprofit organizations fall within the protections of the Commerce Clause in its dormancy, it has held expressly that such organizations fall within Congress's power to regulate under the Commerce Clause. See, *e.g.*, *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 570 (1982); *Goldfarb*, 421 U.S. at 787-88; *Polish Nat'l Alliance*, 322 U.S. at 648; *Associated Press*, 301 U.S. at 128.

This Court has recognized explicitly that an activity's status as being in the stream of interstate commerce does not depend on the transmission of "value." In cases involving the transportation of wastes, the Court has held that solid waste can be interstate commerce despite the fact that the waste itself has no commercial value. See, *e.g.*, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992). Moreover, even if the question as to whether an activity constitutes "interstate commerce" depended on providing "value," nonprofit organizations readily satisfy that requirement. They provide a number of important educational, research, health, social, religious, artistic, and cultural services that are not provided by for-profit institutions or governments. Nonprofit institutions account for a significant share of the nation's economic activity.

Even if the Court were to conclude that nonprofit businesses do not directly engage in interstate commerce, nonprofit institutions manifestly "affect" interstate commerce in a substantial way. Nonprofit organizations both use and provide goods and services in the stream of interstate commerce. Nonprofit organizations provide industry codes and standards as well as information and advice,

affecting the policies and economic viability of other government, for-profit, and not-for-profit entities. In addition, nonprofit organizations employ a substantial number of individuals nationwide. Nonprofit organizations, moreover, compete among themselves for donations and other forms of financial suport, or, in the case of colleges and universities, students.

Far from having only an incidental effect on interstate commerce, the discriminatory law Maine has crafted will make it difficult for not-for-profit institutions to continue to provide their goods and services across state lines and will disadvantage those nonprofits that operate on a national or global basis. In today's environment of scarce direct public funding, not-for-profits depend heavily on tax exemptions and donations. Under the decision of the Maine Supreme Judicial Court, interstate nonprofits will no longer receive tax exemptions and will be forced to pass their increased costs along to their customers and beneficiaries or else provide fewer goods or services—simply because they do not operate for monetary gain and are therefore not entitled to the constitutional protections afforded for-profit organizations similarly operating in the stream of interstate commerce. This discrimination is precisely the kind of economic protectionism proscribed by the Commerce Clause. See *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 853-54 (1996).

If the decision below is allowed to stand, its ultimate effects will be far reaching. Nonprofit institutions that have beneficiaries in more than one state may be denied the same tax treatment as local institutions, detrimentally affecting their financial health. If other states follow Maine's lead, interstate nonprofit organizations may soon be treated differently for a wide variety of state and local government purposes. Such a result not only will severely undermine the financial strength of these organizations, but also will seriously endanger the future viability of nationally coordinated nonprofit institutions.

ARGUMENT

I. NOT-FOR-PROFIT ORGANIZATIONS THAT ARE ENGAGED IN OR SUBSTANTIALLY AFFECT INTERSTATE COMMERCE ARE PROTECTED BY THE COMMERCE CLAUSE WHEN APPLIED IN ITS DORMANT STATE.

The Maine Supreme Judicial Court below held that Maine's tax exemption statute limiting exemptions to those nonprofit organizations that principally benefit Maine residents did not violate the Commerce Clause.[2] In support of the decision below, respondents argue that it is permissible to treat nonprofit organizations dissimilarly and less favorably than for-profit organizations. This argument is refuted by two constitutional principles enunciated by this Court. First, Article I, Section 8 of the Constitution encompasses not-for-profit organizations. Second, the protections of the Commerce Clause in its dormant state are coextensive with the ambit of Congress's authority to regulate interstate commerce.

A. This Court Previously Has Held That Not-For-Profits May Engage In Or Substantially Affect Interstate Commerce And May Therefore Be Subject To Congressional Regulation Under The Commerce Clause.

This Court has held that Congress's power to regulate under the Commerce Clause extends to nonprofit organizations that are engaged in or substantially affect commerce. In *Associated Press* v. *NLRB*, 301 U.S. 103 (1937), the Court found that the Associated Press, a nonprofit newsgathering agency with divisions across the country, was engaged in interstate commerce within the meaning of the Commerce Clause and the National Labor Relations

[2] The Commerce Clause provides: "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Act. *Id.* at 128. In reaching its conclusion, the Court stated the nonprofit's operations "involve[d] the constant use of channels of interstate and foreign communication." *Id.* The Court held that because of their business nature the Associated Press's activities constituted "commercial intercourse" within the meaning of the Commerce Clause. *Id.* The Court specifically noted that "[t]his conclusion is unaffected by the fact that [the Associated Press] does not sell news and does not operate for profit." *Id.* at 128-29.

Similarly, in *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944), the Court recognized that Congress also has the power to regulate nonprofit organizations that "affect" interstate commerce. Specifically, the Court found that where a nonprofit fraternal organization arranged for and required its members to buy insurance across state lines, its labor practices affected interstate commerce and thus fell within the jurisdiction of the National Labor Relations Board, the agency to which Congress had delegated its Commerce Clause power. *Id.* at 648. Thus, under the Commerce Clause, Congress has the authority to regulate nonprofits affecting interstate commerce.

In accordance with these principles, the Court also has found that the American Society of Mechanical Engineers, a nonprofit membership corporation, "wields great power in the Nation's economy," providing codes and standards affecting the economic viability of a wide variety of businesses. *American Soc'y of Mechanical Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). The Court held that "the fact that ASME is a nonprofit organization does not weaken the force" of applicable antitrust laws passed pursuant to Congress's authority under the Commerce Clause. *Id.* at 576; see also *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language

of § 1 [of the Sherman Act] applies to nonprofit entities"). Likewise, in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court held that the standardized billing rates set by a voluntary nonprofit bar association for the express purpose of eliminating "competition" for essential legal services substantially affected interstate commerce. *Id.* at 786. "[T]he activities of lawyers play an important part in commercial intercourse." *Id.* at 788. Thus, this Court has held that nonprofit organizations are subject to federal antitrust liability even though they do not operate for profit.

B. The Definition Of "Interstate Commerce" Used To Measure The Scope Of Congress's Power Under The Commerce Clause Applies In The Same Way When The Clause Is Dormant.

This Court has clearly held that the definition of "interstate commerce" does not change with the particular application of the Commerce Clause. In *City of Philadelphia* v. *New Jersey*, this Court rejected a state's assertion that the term "commerce" had a " 'much more confined . . . reach' " under the "dormant" or "negative" Commerce Clause. 437 U.S. 617, 621 (1978). The Court found that the state court erred in assuming that "a two-tiered definition of commerce" was required. *Id.* at 622. The Court held that, if Congress has the power to regulate an article or activity of interstate commerce, states are not free from constitutional scrutiny when they attempt to regulate the article or activity. See also *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979).

The concept of "interstate commerce" incorporated in the negative application of the Commerce Clause is derived from the positive application of the Commerce Clause. *Associated Indus.* v. *Lohman*, 114 S. Ct. 1815, 1820 (1994). As this Court explained, the Commerce Clause "also embodies a negative command forbidding the States to discriminate against interstate trade." *Id.*

Articles and activities this Court has found to be "interstate commerce," and thus within Congress's regulatory power under the positive application of the Commerce Clause, also receive the protections against discriminatory regulation by the states embodied in the negative application of the Commerce Clause.

As discussed above, the Court consistently has found that nonprofit entities may be engaged in or substantially affect commerce. Nonprofit entities are not excluded from the reach of the Commerce Clause merely because of the nonprofit nature of their interstate commercial activities. Because the definition of "interstate commerce" is the same under both the positive and negative applications of the Commerce Clause, nonprofit entities are not excluded from the protections of the Commerce Clause against state discrimination. *Cf. National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 555 (1977) (applying Commerce Clause in dormant state to nonprofit organization in determining whether state had sufficient nexus to impose tax collection obligation on out-of-state seller).

C. Nonprofit Organizations May Engage In Interstate Commerce Under The Commerce Clause In Its Dormant State.

The question of whether nonprofits are engaged in or substantially affect interstate commerce does not depend on whether the organizations transmit goods and services which are conceived to be of a certain monetary value or provide their goods or services only in order to receive a certain amount of monetary value in return. The Court's rulings in cases involving the interstate transportation of wastes and the restrictions various states attempted to impose are dispositive here. In those cases, this Court directly addressed the argument that waste does not involve value and therefore does not constitute commerce protected by the dormant Commerce Clause. In each of

these cases, the Court rejected the argument that the nature of interstate commerce depends on commercial value. *C & A Carbone, Inc.* v. *Town of Clarkstown*, 114 S. Ct. 1677, 1682 (1994); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992); *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S. 334, 340 n.3 (1992); *City of Philadelphia*, 437 U.S. at 622-23.

Instead, this Court has held that "[*a*]*ll* objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia*, 437 U.S. at 622 (emphasis added). Whether the articles in question are considered "valueless" by the regulating state simply is irrelevant to the constitutional analysis. *Id.* The relevant inquiry is whether the article or activity in question is an article or activity of interstate commerce or substantially affects interstate commerce.

Nonprofit organizations manifestly provide goods and services which constitute or substantially affect interstate commerce. Nonprofit higher education institutions, for example, often provide education to a substantial number of students who travel across state borders to attend these universities and colleges. See National Center for Education Statistics, *Digest of Education Statistics 1995*, at 204; Pet. at 14 n.32. In fact, over 15% of the new students of educational institutions nationwide come from states other than the state in which the educational institution is located. National Center for Education Statistics, *supra*, at 204. Private nonprofit institutions often have an even larger percentage of out-of-state students. See, *e.g.*, Pet. at 14 n.32. Classes may even be transmitted across state borders. See Peter D. Lambert, *University Consortium Signs Onto Telstar*, Broadcasting & Cable, Dec. 21, 1992, at 47; *MarketPlace Aviation Classes Broadcast by Satellite to Four Colleges*, 313 Aviation Daily 498 (1993). Universities and colleges also exchange information, books, and staff across state borders. Consortiums have been

formed which bring together educational institutions and industry or other nonprofit organizations in many states and have influence nationwide as well as globally. See Derek Bok, *What's Wrong with Our Universities?*, 14 Harv. J.L. & Pub. Pol'y 305, 329-30 (1991); see also *Biosphere, Columbia University Form Science Consortium*, Associated Press, Aug. 14, 1994, *available in* WESTLAW, Allnews Database; *A Consortia of Universities, Businesses and Non-Profit Organizations*, Env't Wk., July 9, 1992; *Prepared Testimony of Dr. Arden L. Bement, Director Midwest Superconductivity Consortium*, Fed. News Serv., Feb. 29, 1996, *available in* WESTLAW, Allnews Database. Professors of universities and colleges often consult with industry or government outside the state in which the colleges or universities with which they are associated are located. Bok, *supra*, at 320.

Educational nonprofit organizations, as well as cultural, social, trade, or religious nonprofits, formulate policies, provide advice, regulate conduct, and buy and trade goods and services across the country. For instance, organizations such as the National Geographic Society, the Sierra Club, the YMCAs, the National Multiple Sclerosis Society, the United Way, and the School of the Art Institute provide a wide variety of articles and services across state lines. See Edward J. Skloot, *Enterprise and Commerce in Nonprofit Organizations, in The Nonprofit Sector: A Research Handbook* 380, 381-83 (Walter W. Powell ed., 1987); Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835, 842 (1980); Evelyn A. Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. Rev. 1761, 1771-72 (1995); Jon Anderson, *Art Institute Exhibit Brought Out Color of Monet*, Chi. Trib., Dec. 7, 1995, at 1 (stating that the "Claude Monet: 1840-1926" exhibit of the Art Institute of Chicago drew 694,800 "out-of-towners," 125,450 of which were from foreign countries,

and had an economic impact similar to Chicago's major conventions); Leah Marcus, *Summer School Is a Hot Topic*, Chi. Sun-Times, May 2, 1995, at 3.

Moreover, the goods and services provided by nonprofit organizations in interstate commerce *do* have monetary value. Demand clearly exists for the goods and services nonprofits provide across state lines. In fact, nonprofits often "come into existence when for-profit firms and the government fail to meet the demands of certain groups in a particular market." Avner Ben-Ner, *Who Benefits from the Nonprofit Sector?: Reforming Law and Policy Towards Nonprofit Organizations*, 104 Yale L.J. 731, 734 (1994) (book review); see also Hansmann, *supra*, at 843-45. Nonprofits confer value by providing a number of important health, educational, scientific, social, religious, artistic, and cultural services. See generally Independent Sector, *Why Tax Exemption? The Public Service Role of America's Independent Sector* (1993); Gabriel Rudney, *The Scope and Dimensions of Nonprofit Activity, in The Nonprofit Sector: A Research Handbook* 55, 57 (Walter W. Powell ed., 1987); *Who Benefits from the Nonprofit Sector?* (Charles T. Clotfelter ed., 1992).[3] Households are the major consumers of nonprofit services, accounting for approximately half of all sales; governments account for another 43 percent. Rudney, *supra*, at 62.

"Private nonprofit institutions account for a sizable and growing share of our nation's economic activity." Hansmann, *supra*, at 835. And "[t]he sectors in which

[3] Nonprofits are often the forerunners in "risky but valuable activities" that for-profit businesses initially may avoid because low returns are predicted for such activities. Later, these activities may evolve into a new industry with for-profit businesses entering the market to provide such services as well. Evelyn A. Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C. L. Rev. 1761, 1805-06 (1995). For example, nonprofit organizations were the first to provide recycling services and home health care and now those industries are dominated by for-profit firms. *Id.*

these institutions are most common—education, research, health care, the media, and the arts—are vital elements in the modern economy." *Id.* Moreover, nonprofit organizations play "a dominant role in the health, social services, education, and high-culture industries." Ben-Ner, *supra*, at 736. To produce its goods and services, the nonprofit sector spends over $389 billion each year in operating expenses—approximately seven percent of the gross national product. Virginia A. Hodgkinson et al., *Nonprofit Almanac 1992-1993: Dimensions of the Independent Sector* 20-21; see also Ben-Ner, *supra*, at 736; Independent Sector, *America's Independent Sector in Brief* 1 (1996). The education and research subsector alone spends over $80 billion, close to 20 percent of the nonprofit sector's total expenditures, much of this in interstate commerce. See *America's Independent Sector in Brief*, *supra*, at 1. Nonprofit institutions receive $90 billion in donations each year. Charles T. Clotfelter, *The Distributional Consequences of Nonprofit Activities, in Who Benefits from the Nonprofit Sector?* 1, 1 (Charles T. Clotfelter ed., 1992). Many nonprofit subsectors are "heavily dependent on fees by paying customers, with private payments accounting for at least half of total revenues."[4] Clotfelter, *supra*, at 6-7; see also Hansmann, *supra*, at 840-41. These expenditures and revenues cannot be ignored simply because the organizations generating this commerce do not operate for profit.

D. Not-For-Profit Organizations May Substantially Affect Interstate Commerce Within The Meaning Of The Commerce Clause In Its Dormancy.

In *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), this Court reiterated that a wide variety of seemingly

[4] The fees charged by these nonprofit organizations for services provided, such as hospital charges, tuition, and admission fees, of course do not cover the full costs. Gabriel Rudney, *The Scope and Dimensions of Nonprofit Activity, in The Nonprofit Sector: A Research Handbook* 55, 62 (Walter W. Powell ed., 1987). The remaining costs are recovered through various subsidies. *Id.*

intrastate economic activities "substantially affect" interstate commerce and are thus subject to Commerce Clause scrutiny. "Examples include the regulation of intrastate coal mining[,] *Hodel* [v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981)], intrastate extortionate credit transactions, *Perez* [v. *United States*, 402 U.S. 146 (1971)], restaurants utilizing substantial interstate supplies, [*Katzenbach* v.] *McClung* [379 U.S. 294 (1964)], inns and hotels catering to interstate guests, *Heart of Atlanta Motel* [v. *United States*, 379 U.S. 241 (1964)], and production and consumption of home-grown wheat, *Wickard* v. *Filburn*, 317 U.S. 111 (1942)." 115 S. Ct. at 1630. Furthermore, the Court explicitly made clear that these examples were "by no means exhaustive." *Id.*

Nonprofit organizations generally, and petitioner in particular, substantially affect interstate commerce. *First*, nonprofit organizations use a substantial number of supplies and purchase goods and services from the stream of interstate commerce. *Second*, like local hotels and restaurants, many nonprofit organizations substantially affect interstate commerce by serving a large number of out-of-state consumers. Petitioner specifically provides camping and related services to a large number of beneficiaries who overwhelmingly come from out-of-state to receive those services.[5] *Third*, nonprofits often employ workers to aid in the provision of their goods and services and that employment substantially affects interstate commerce. The nonprofit sector as a whole currently employs over ten percent of the nation's entire work force. Clotfelter,

[5] Moreover, given the number of individuals who come to Maine to receive petitioner's services, petitioner substantially affects the interstate travel and transportation of persons, and thus interstate commerce. *See United States* v. *Lopez*, 115 S. Ct. 1624, 1629 (1995); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964); *see also Edwards* v. *California*, 314 U.S. 160, 172 (1941) ("transportation of persons is 'commerce' ").

supra, at 1; Hodgkinson et al., *supra*, at 18. And, as of 1982, the nonprofit sector employs over fourteen percent of the nation's service sector work force. Rudney, *supra*, at 55-60. The education and research subsector alone employs over 20 percent of the nonprofit sector work force. *America's Independent Sector in Brief*, *supra*, at 1; Hodgkinson et al., *supra*, at 115. Moreover, the nonprofit sector generally "is highly labor intensive," with close to half of its current operating expenses being used to compensate employees. Hodgkinson et al., *supra*, at 113; see also Rudney, *supra*, at 57. *Finally*, nonprofits make a substantial contribution to the national economy. By 1990, nonprofits were providing 6.2 percent, or $289 billion, of the national income. Hodgkinson et al., *supra*, at 17; Lewis, *supra*, at 1769.

Nonprofit organizations also provide a wide variety of articles and services across state lines to individuals, other nonprofit organizations, government entities, and for-profit businesses and often compete among themselves for funding, whether from consumers or donors. Jerald Schiff & Burton Weisbrod, *Competition Between For-Profit and Nonprofit Organizations in Commercial Markets, in The Nonprofit Sector in the Mixed Economy* 127, 127 (Avner Ben-Ner & Benedetto Gui eds., 1993); Richard Steinberg, *Nonprofit Organizations and the Market, in The Nonprofit Sector: A Research Handbook* 118, 130 (Walter W. Powell ed., 1987). These activities allow the nonprofit organizations to subsidize their efforts, a particularly important financial strategy given that traditional sources of publicly funded support are dwindling. Henry B. Hansmann, *The Two Nonprofit Sectors: Fee for Service Versus Donative Organizations, in The Future of the Nonprofit Sector* 91, 98-99 (Virginia A. Hodgkinson et al., eds., 1989); Schiff & Weisbrod, *supra*, at 127-28. While nonprofits do not participate in these activities for profit, they undeniably affect interstate commerce in a substantial way through their activities.

II. MAINE'S TAX LAW HAS MORE THAN A MERELY INCIDENTAL EFFECT ON NONPROFIT ACTIVITIES.

Exemptions from taxes are a government subsidy that is of great value to nonprofit institutions. In 1985 nonprofits generated an estimated $110 billion in fee, sale, and investment revenues exempt from federal income taxes and held approximately $300 billion in real property exempt from state and local property taxes. John G. Simon, *The Tax Treatment of Nonprofit Organizations: A Review of Federal and State Policies, in The Nonprofit Sector: A Research Handbook* 67, 67 (Walter W. Powell ed., 1987).

By denying a tax exemption benefit only to nonprofit organizations serving primarily out-of-state residents, Maine, and those states that inevitably would follow Maine's lead, severely hinder interstate commerce. The cost to interstate nonprofit organizations of providing goods and services will be greater than the cost to those nonprofit groups which provide goods and services predominantly intrastate. As a result, the amount of goods and services provided by interstate nonprofits will be reduced. Moreover, for petitioner and other nonprofits with a distinctively interstate clientele, providing services only to in-state residents would mean providing no services at all. In contrast, nonprofits that principally serve in-state individuals or organizations will continue to receive the state's subsidy of their intrastate activity.

This discrimination by the state of Maine entails precisely the kind of economic protectionism that the dormant Commerce Clause proscribes. See *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 853-54 (1996). Through its subsidization of nonprofit organizations that principally serve in-state interests, the state is manifestly preferring those organizations and aiding their economic development. Equivalent benefits are denied to other similarly situated nonprofit organizations simply because they are

engaged in interstate rather than intrastate commerce. In this case, the amount of subsidy is concrete. A nonprofit camp providing the exact same goods and services as petitioner but primarily to Maine residents would avoid paying property taxes amounting to $36.64 per camper, almost 10% of the charged tuition. Pet. App. at 17a n.4. Maine's discriminatory property tax exemption is in direct violation of the dormant Commerce Clause. *Fulton Corp.*, 116 S. Ct. at 854.

* * * *

In sum, if the decision below holding that a state can deny otherwise available subsidies to nonprofit institutions based on whether the institution principally benefits out-of-state residents is upheld, a significant portion of interstate commerce and a substantial amount of not-for-profit commercial activity will be curtailed. If state and local governments are permitted to discriminate against interstate nonprofit organizations in their quest for new revenue sources, nonprofits benefitting out-of-state residents will be forced to operate at higher cost or to diminish services. Either option will put them at a competitive disadvantage *vis-a-vis* those nonprofit organizations that are exclusively intrastate in character, and will further hinder those for-profit businesses providing goods and services to interstate nonprofit organizations as well as the out-of-state consumers buying the goods and services of interstate nonprofits. Nonprofit organizations such as petitioner can avoid these harmful consequences only by desisting from their interstate activities. But the fundamental principle underlying the dormant Commerce Clause is the recognition of Congress's plenary authority to regulate interstate commerce. Maine's discriminatory tax exemption intrudes into Congress's exclusive domain and is therefore unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Maine Supreme Judicial Court.

Respectfully submitted,

CARTER G. PHILLIPS
NATHAN C. SHEERS
MARISA A. GÓMEZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

SHELDON ELLIOT STEINBACH *
AMERICAN COUNCIL
ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036-1193
(202) 939-9355

Counsel for Amici Curiae

May 10, 1996

* Counsel of Record

No. 94-1988

In the Supreme Court of the United States

OCTOBER TERM, 1995

CAMPS NEWFOUND/OWATONNA, INC., PETITIONER,

v.

TOWN OF HARRISON, *ET AL.*, RESPONDENTS.

On Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF THE CHRISTIAN LEGAL SOCIETY, THE COALITION FOR CHRISTIAN COLLEGES & UNIVERSITIES, WORLD RELIEF, THE INTERNATIONAL UNION OF GOSPEL MISSIONS, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS and THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STEVEN T. MCFARLAND
Center for Law and Religious Freedom, Christian Legal Society
4208 Evergreen Lane
Annandale, Virginia 22003
(703) 642-1070

JAMES C. GEOLY
Counsel of Record
KEVIN R. GUSTAFSON
MARLAINE J. MCVISK
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amici Curiae

42pp

QUESTION PRESENTED

Whether a state statute denying property tax exemption to nonprofit entities who principally serve non-residents violates the Commerce Clause by impermissibly discriminating against entities and individuals who transact in interstate commerce.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1988

CAMPS NEWFOUND/OWATONNA, INC., PETITIONER,

v.

TOWN OF HARRISON, *ET AL.*, RESPONDENTS.

On Writ of Certiorari to the Supreme Judicial Court of Maine

BRIEF OF THE CHRISTIAN LEGAL SOCIETY, THE COALITION FOR CHRISTIAN COLLEGES & UNIVERSITIES, WORLD RELIEF, THE INTERNATIONAL UNION OF GOSPEL MISSIONS, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE NATIONAL ASSOCIATION OF EVANGELICALS and THE EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER*/

INTEREST OF THE *AMICI CURIAE*

Amicus curiae **Coalition for Christian Colleges & Universities ("CCCU")**, founded in 1976, is a professional association of over 90 Christian academic institutions

---

*/ Consents to the filing of this brief have been lodged with the clerk.

representing over 40 different religious traditions and denominations in over 30 states. CCCU member schools enroll over 150,000 students each year. CCCU coordinates professional development opportunities for administrators and faculty and administers five off-campus student programs. A critical mission of CCCU is to provide public advocacy for Christ-centered higher education. On behalf of its members, CCCU has a keen interest in this case. The vast majority of CCCU members and affiliates serve large proportions of students from all over the United States and all over the world. A ruling upholding Maine's statute would enable the home states of CCCU's members to threaten the tax exemption (and thus the mission) of these institutions. Moreover, it would threaten the rights of students everywhere to seek a religious education at a private, nonprofit college or university.

Amicus curiae **World Relief**, headquartered in Carol Stream, Illinois, is an overseas relief agency sponsored by *amicus* National Association of Evangelicals and supported through evangelical churches. World Relief ministers to the world's needy through emergency relief in times of war and natural disaster, and through rehabilitative and development programs like refugee resettlement. Most of its activities occur outside Illinois and most of the funds raised are spent overseas in direct assistance programs or aid. If Illinois were permitted to target charitable groups whose focus was to aid others who -- by definition -- were outside the state, World Relief and other international aid agencies would be at risk.

Amicus curiae **International Union of Gospel Missions ("IUGM")**, founded in 1913, is an association of 240 Christian inner city rescue missions and ministries in the United States that feed and house the homeless and offer Christian charity and rehabilitation. Last year, IUGM members served 26,551,000 meals to the homeless and housed 9,581,000 men, women and children in their mission shelters. Each day over 9,800 people take part in rehabilitation programs, jail and prison ministries and an array of other outreaches to the poor and needy. The first member mission in the United States was the New York City Rescue Mission, founded in 1872. IUGM programs have always been evangelical in their outreach, and Good Samaritan in their nature.

The various missions operated at IUGM members' headquarters care for local residents and non-residents without prejudice. Many served have no legal address at all because they have lived on the streets for a long period of time. These missions would not be able to prove such clients were local residents.

Many missions have rehabilitation centers and camps away from the cities and adjoining states. It has long been a tradition to "get people out of the cities" for health, rehabilitation and spiritual purposes. Also, some member ministries are rural rehabilitation facilities that have historically accepted people from cities in a multistate region due to the fact that similar services were not available in their home states. Two of these facilities are America's Keswick's Colony of Mercy (founded 1903) in Whiting, New Jersey and Homes of Grace (founded 1965) in Van Cleave, Mississippi. These programs accept people from cities like Philadelphia, New York and New Orleans, and help them to become able providers for their families and responsible taxpayers. In almost all cases, the funds for these programs are private, raised mostly through donations.

Member missions such as Goodwill Home and Missions of Newark, New Jersey (Camp in New York); Reno-Sparks (Nevada) Rescue Mission (rehabilitation facility in California); Central Union Mission of Washington, D.C. (children's camp in Maryland); and Boston (Massachusetts) Rescue Mission (farm in New Hampshire) all have facilities in other states and would be at risk under the Maine statute. All of these facilities buy materials locally, as well as hire

local people to operate their programs and maintain their facilities.[1/]

Amicus curiae **Southern Baptist Convention ("SBC")** is the nation's largest Protestant denomination, with over 39,900 local churches and 16.5 million members. **Christian Life Commission ("CLC")** is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years regarding the primacy of the principle of religious liberty as contained in the Religion Clauses of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases such as this case.

SBC is headquartered in Nashville, Tennessee, where it owns substantial improved real estate presently exempt from property taxation. Its mission is carried out with contributions from member churches across the United States. Only a small portion of contributions remain within the State of Tennessee. A significant portion of contributions are disbursed outside the United States. For the Budget Year 1993-1994, SBC had total budget receipts of $270,695,300. Of this amount, only 2.86% stayed within the State of Tennessee. 58.91% of total receipts was disbursed to the Foreign Mission Board which in turn disbursed most of these proceeds to sites outside of the United States.

Amicus curiae **National Association of Evangelicals ("NAE")** is a nonprofit association of evangelical Christian

---

1/ Many IUGM missions also use camps belonging to others which they rent for below-market rates. Charleston (West Virginia) Urban Youth Ministries brings over 100 children from the housing projects of downtown Charleston to a church camp in Ohio that provides facilities at low cost. If the Ohio camp were faced with loss of property tax exemption for providing this benefit, it might well withdraw this opportunity and make it more difficult or impossible for children to leave the city for a week on a lake in the country.

denominations, churches, organizations, institutions and individuals. It includes 49 member denominations,[2/] some 50,000 churches and 200 parachurch ministries and schools. It represents a broad range of theological traditions grounded in the biblically-based NAE seven-point Statement of Faith. There are 12 NAE camps and many other churches, ministries and other organizations in Maine who are directly affected by the statute at issue in this case.

Virtually all of the NAE's member organizations around the country will be threatened if this Court does not reverse the ruling below. The various member denominations, camps, retreat centers, educational institutions, charities and relief organizations serve large numbers of people who live in other states and countries. One member, Christian Camping International/USA ("CCI"), has over 900 member camps, conferences and retreat centers in 47 states and the District of Columbia. A ruling permitting states to deny tax exemption to nonprofits who do not serve mostly in-state residents would jeopardize all of these critical ministries. Indeed, such a ruling would strike at the heart of the religious mission of NAE's members: to reach as many people as possible, wherever they may live, with the word of God.

Amicus curiae **Evangelical Council for Financial Accountability ("ECFA")**, founded in 1979, is a nonprofit association of 835 evangelical, nonprofit organizations requiring the highest standards of financial integrity and

---

2/ Some of the member denominations of NAE are the Assemblies of God, the Baptist General Conference, the Conservative Baptist Association of America, the Evangelical Free Church of America, the Evangelical Mennonite Church, the Evangelical Methodist Church, the Evangelical Presbyterian Church, the Free Methodist Church of North America, the General Association of General Baptists, the Presbyterian Church in America, the Reformed Presbyterian Church of North America and the Salvation Army (National Headquarters).

Christian ethics. ECFA provides guidelines for the preparation and maintenance of accounting and financial statements to religious and charitable organizations to ensure the highest level of integrity and professionalism in Christian stewardship. ECFA also accredits those evangelical organizations that can demonstrate their compliance with these standards. Members of ECFA include Compassion International, Navigators, World Vision and Focus on the Family.

A majority of ECFA's 835 members would be affected by laws like Maine's since most are national or international in their outreach. As a matter of religious doctrine, these organizations seek to assist anyone in need regardless of geographic boundaries. Often it is those people outside a state or outside the U.S. who need the most help. The threat of a loss of tax exemption would put a barrier in the way of these ministries; it would not result in more food and medical supplies dispensed "in-state."

Amicus curiae **Christian Legal Society ("CLS")**, founded in 1961, is a nonprofit, tax exempt professional association of over 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the **Center for Law and Religious Freedom**, has advocated the protection of religious liberty in state and federal courts throughout the nation. The CLS Center has filed briefs *amicus curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before this Court involving church-state relations since 1980. CLS has joined this brief because of its interest in protecting religious organizations from the kind of discriminatory treatment embodied by the Maine statute at issue. If the statute were allowed to stand, churches, Bible camps, religious schools, colleges and universities, and any number of other ministries would be penalized with loss of tax exemption for, in effect, practicing their religion by ministering to people across state lines.

SUMMARY OF ARGUMENT

I. The Maine statute at issue denies a generally available tax exemption to nonprofit charitable and religious organizations who serve a population "principally" of nonresidents of Maine.[y] Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)(1964 & Supp. 1994) (hereinafter referred to as "Section 652"). Religious nonprofits serve many people across state and national borders, often in far greater numbers than those served within the nonprofit's home state. If this Court permits states to deny tax exemption on the basis of the residence of the "consumer," many of the nation's religious and charitable organizations could lose tax exemption.

The relationship between a religious group and its adherents across a state line is not merely that of a business and a customer; it has deep religious significance and is often part and parcel of the practice of religion. This is obvious where the nonprofit is a religious denomination with a national or worldwide constituency, such as *amicus* Southern Baptist Convention, but it is equally true where the nonprofit is a religious charity like *amicus* World Relief (which provides assistance to the poor in the Third World), a religious camp such as those represented by *amicus* NAE or a religious college or university such as those represented by *amicus* CCCU. In each case, the cross-border "transactions" are acts of religious free exercise accorded the protection of the Religion Clauses of the First Amendment and the Religious Freedom Restoration Act. Section 652 is in conflict with the Free Exercise rights of religious nonprofits and their constituents because it penalizes the exercise of

---

[y] The statute applies to nonprofits who charge fees to out-of-state consumers or beneficiaries in excess of $30.00 per week. Section 652's only exception covers corporations organized "for the sole purpose of conducting medical research." Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)(1964 & Supp. 1994).

religion across state lines. Section 652 also risks violating the Establishment Clause because a scheme of property taxation for religious bodies requires a level of entanglement in the affairs of religious bodies that this Court consistently has prohibited.

In addition, *amici* and their members would face staggering costs and corresponding reductions in services if states were permitted to adopt statutes like Maine's. Virtually all *amici* receive some form of state and local tax exemption, especially real property tax exemption. For *amici* and their members, this exemption is critical to their ability to continue their works of charity, education and ministry. If Section 652 is permitted to stand, even religious denominations could face the prospect of loss of tax exemption and severe financial hardship.

II. The Commerce Clause was adopted to ensure a national free market and to prevent states from placing barriers in the way of interstate commerce. Indeed, the economic hardships endured under the Articles of Confederation were attributed to the absence of free interstate trade, the need for which was the principle reason for convening the Constitutional Convention. Economic unity was seen as necessary to national unity and prosperity. From the landmark case of *Gibbons v. Ogden* onward, this Court consistently has applied the Commerce Clause to strike down state legislation which placed undue burdens on the stream of commerce.

Section 652 is in patent derogation of the Commerce Clause. It expressly penalizes nonprofits who deal with residents of other states by revoking their property tax exemption, and thereby penalizes residents of other states whose transactions with Maine nonprofits must bear the costs of the resulting taxation. The legislative history of Section 652 is unequivocal: legislators intended to raise revenue at the expense of non-residents, or at the expense of entities that were perceived to serve non-residents.

Section 652 discriminates against sellers who transact with non-residents instead of residents. Section 652 discriminates against consumers who are non-residents, rather than residents. Indeed, by discriminating against a seller's *choice* to serve non-residents, Section 652 discriminates against interstate commerce itself, and is thus *per se* invalid. The statute does not fulfill any non-discriminatory purpose that could not just as easily be served by a non-discriminatory statute. Even under a "flexible approach," Section 652 must fall. The substantial burdens it places on interstate commerce are not necessary to obtain the asserted local benefit of increased tax revenues. Tax revenues can be increased by any number of less burdensome means.

The Court should reverse the judgment of the Supreme Judicial Court of Maine.

ARGUMENT

I. THE SUPREME JUDICIAL COURT'S RULING THREATENS RELIGIOUS, CHARITABLE AND EDUCATIONAL INSTITUTIONS THROUGHOUT THE COUNTRY.

Religious and charitable organizations are vital to the life of this nation. They provide food to the hungry, shelter to the homeless, comfort to the grieving and hope for the faithful. Religious recreational institutions, such as the petitioner, provide not only rest and relaxation, but religious instruction and spiritual rejuvenation as well. Private educational institutions serve hundreds of thousands of our citizens, many of whom choose colleges and universities associated with religious denominations or religious ministries. In short, even putting aside the illegality of legislation aimed at this cherished resource, any threat to the survival of our religious and charitable organizations must be seen as a threat to the quality of life we have enjoyed for over two centuries:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-

> Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970).

A. Removal Of Tax Exemption For Religious Charities Would Raise Serious Religious Liberty Conflicts, Igniting Costly Litigation And Divisive Competition.

Amici are all religious charities and other religious groups who seek to exercise their right to religious liberty under the First and Fourteenth Amendments. Religious liberty is not limited to the silent, subjective belief of an individual or group. *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). It also encompasses the practice of religion and the right of people and groups to communicate and associate for the purpose of practicing their religion. *Yoder*, 406 U.S. at 215, 220; *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). Tax exemption for religious groups provides an important protection against undue entanglement between the government and religion, fulfilling the requirements of the Establishment Clause. Tax exemption also shields religion from undue interference or burden by government, affording religious groups the protections guaranteed by the Free Exercise Clause and the Religious Freedom Restoration Act.[4] The denial of tax exemption on the grounds that a church or other religious institution serves adherents who happen to live across state lines thus presents a serious conflict with this Court's longstanding precedents defending the right to religious liberty.

---

[4] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb *et seq.*).

This Court examined the question of tax exemption for religious bodies in depth in *Walz*, where the Court found that tax exemption for religious bodies does not constitute a violation of the Establishment Clause:

> Nothing in [our] national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief.

Walz, 397 U.S. at 678. Thus, a statute granting tax exemption to religious bodies is not an attempt to establish religion, "it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions." *Id.* at 673.

Indeed, as the Court observed, real estate *taxation* of religious bodies heightens the risk of excessive government entanglement in violation of the Establishment Clause:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
>
> * * * * *
>
> [E]xemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Id. at 674, 676.

As anticipated in *Walz*, Section 652 creates the risk of significant entanglement between religious bodies and the government, raising serious Establishment Clause conflicts.

Newly taxable church properties are now subject to "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Walz*, 397 U.S. at 674. Indeed, the Maine statute presents an added danger, for religious groups can legitimately fear that the state will enforce the statute by investigating the membership (or the recipients of benefits) of exempt entities, a level of interference that this Court has long condemned. *E.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

In *Walz*, this Court did not reach the issue of whether denial of tax exemption would constitute a *per se* violation of the Free Exercise Clause, although Justice Brennan (concurring) explicitly recognized that possibility. *See* 397 U.S. at 692 n.12. The Court need not reach so broad an issue here, for Section 652 does more than revoke tax exemption; it revokes tax exemption in a manner that discriminates directly against the free exercise of religion. By denying tax exemption on the basis of the residency of the individual served by an exempt entity, the statute severely penalizes religious organizations for ministering to American citizens who have beliefs, rather than geography, in common. Likewise, the statute substantially burdens the rights of out-of-state adherents to freely attend, support or receive charity from their church or religious organization because to do so would constitute a threat to the economic survival of their faith group.

The government simply cannot deny a generally available benefit, such as tax exemption for nonprofits, as a penalty for the exercise of the fundamental right to freely associate for religious purposes. As this Court held in *Murdock*:

> Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse.

319 U.S. at 112. *See also Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981).[5/]

The right sought by Maine to discriminate in taxation carries with it the inherent danger of creating substantial burdens to the exercise of religion not only for the groups and individuals represented by *amici*, but also for the institutions and adherents of virtually every faith group. These burdens cannot be justified. *Thomas*, 450 U.S. at 719; *Murdock*, 319 U.S. at 112; 42 U.S.C. § 2000bb-1(a).

This case reaches the Court under the Commerce Clause but, as demonstrated above, Section 652 burdens not merely interstate transactions, but interstate transactions of special significance to which this Court has always accorded added protection. Maine does more than burden interstate commerce; it burdens the rights of American citizens to associate across state boundaries in the common practice of their religion. No set of state interests can justify so dramatic an infringement of basic liberties.

B. Tax Exemption Is Essential To The Survival Of Religious And Charitable Not-For-Profit Institutions.

The vast majority of religious and charitable institutions in the United States receive some kind of state tax exemp-

---

[5/] "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 717-18.

tion.[6] *See Walz*, 397 U.S. at 676 ("All of the 50 States provide for tax exemption of places of worship * * *"). Tax exemption is critical to their survival for, by definition, these organizations are "nonprofit" and do not exist for the purpose of amassing wealth. Rather, they exist to serve the public interest, through public charity, for the good of all.

---

[6] *See* Ala. Code § 40-8-1; Alaska Const. art. IX, § 4; Alaska Stat. § 29.45.030; Ariz. Rev. Stat. § 42-271; Ark. Rev. Stat. § 26-3-301; Cal. Const. art. XIII; Cal. Rev. & Tax Code § 214; Colo. Rev. Stat. § 39-3-101; Conn. Gen. Stat. § 12-81; Del. Rev. Stat. tit. 9, § 8104; D.C. Code Ann. § 47-1002; Fla. Stat. Ann. § 196.196; Ga. Code § 48-5-41; Haw. Rev. Code § 246-32; Idaho Code § 63-105B; 35 ILCS 200/15-40; Ind. Code Ann. § 6-1.1-10-16; Iowa Code Ann. § 427.1; Kan. Stat. Ann. § 79-201; Ky. Const. § 170; La. Const. art. VII, § 21; La. Rev. Stat. Ann. § 47:1708; Me. Rev. Stat. Ann. tit. 36, § 652; Md. Code Ann. tit. 7, § 7-202; Mass. Gen. Laws ch. 59, § 5; Mich. Comp. Laws Ann. § 211.7; Minn. Stat. § 272.02; Miss. Code Ann. §§ 27-31-1 to 23; Mo. Rev. Stat. Ann. § 137.100; Mont. Code Ann. §§ 15-6-201 to 209; Neb. Rev. Stat. § 77-202; Nev. Rev. Stat. §§ 361.125, 361.135, 361.140; N.H. Rev. Stat. Ann. § 72:23; N.J. Stat. Ann. § 54:4-3.6; N.M. Const. art. VIII, § 3; N.Y. Real Prop. Tax Law § 420-a; N.C. Gen. Stat. §§ 105-275 to 278; N.D. Rev. Stat. Ann. § 57-02-08; Ohio Rev. Code Ann. §§ 5709.04 to .17; Okla. Stat. Ann. tit. 28, § 2887; Or. Rev. Stat. §§ 307.130, 307.136, 307.140; 72 Pa. Cons. Stat. Ann. § 5020-201; R.I. Gen. Laws § 44-3-3; S.C. Code Ann. § 12-37-220; S.D. Codified Laws Ann. § 10-4-9 to 9.3; Tenn. Code Ann. § 67-5-212; Tex. Rev. Tax Code Ann. §§ 11.18 to 11.21; Utah Const. art. XIII, § 2; Vt. Stat. Ann. tit. 32, § 3802; Va. Code §§ 58.1-3607, 58.1-3608, 58.1-3650.1 to 3650.642; Wash. Rev. Code Ann. §§ 84.36.020, 84.36.030, 84.36.047, 84.36.060; W. Va. Code § 11-3-9; Wis. Stat. Ann. § 70.11; Wyo. Stat. Ann. § 39-1-201. No state besides Maine withholds real property tax exemptions from charities and religious groups who serve non-residents.

Thus, for most nonprofits, tax exemption of one sort or another is not only a benefit, it is a necessity. If most charities had to pay real estate or income taxes they would have to severely curtail, if not discontinue, their services. Thus, the ironic result of state taxation of these entities would not be to raise revenue, but to drive them out, depriving all of the people served (regardless of where they live) of the benefits or services that the charity provides and of the jobs they provide to the local economy. This may mean closing an international food relief operation or a university. It may mean closing a Bible camp or a retreat house. In any case, the harm is palpable. As Justice Brennan observed, concurring in *Walz*:

> Taxation * * * would bear unequally on different churches, having its most disruptive effect on those with the least ability to meet the annual levies assessed against them. And taxation would surely influence the allocation of church resources. By diverting funds otherwise available for religious or public service purposes to the support of the Government, taxation would necessarily affect the extent of church support for the enterprises that they now promote. In many instances, the public service activities would bear the brunt of the reallocation, as churches looked first to maintain their places and programs of worship. In short, the cessation of exemptions would have a significant impact on religious organizations.

Id. at 692.

Amici would all suffer if states were permitted to withdraw tax exemption for charities serving non-residents.

Amicus CCCU represents over 90 academic institutions in over 30 states, accounting for over 150,000 students. All of these institutions are exempt from state property and income taxes. All would be jeopardized (as would the right

of their students to attend the religious institution of their choice) by any loss of tax exemption.

For example, CCCU member Houghton College, a Christian college in Houghton, New York with over 1,400 students, is affiliated with the Wesleyan Church. The school's over 1,100 acres in upstate New York currently is exempt from real property taxes. However, if the school were forced to pay taxes on the campus property, its tax bill would be approximately $3.2 million. Houghton would be required to raise fees at least 15%, resulting in a vicious cycle of fewer students, less revenue, fewer employees and diminished denomination-member participation. Ultimately, the school could be faced with property sale, closure, merger or an extraordinary financial bail-out, any of which would result in crippling the school.[7/]

In addition, there are over 1,000 camps and retreat centers represented by *amicus* NAE, all of which are tax exempt organizations. One of NAE's largest member organizations is Christian Camping International/USA. Founded in 1963, CCI is an association of over 900 camps and retreat centers with over 5,000 full-time staff and 100,000 summer staff. CCI members serve over 5 million people annually from over 176,600 churches, totaling over 15 million camper days per year. CCI members have approximately 22,200 buildings, covering an estimated 221,200 acres (approximately 346 square miles) for Christian camping use. CCI has estimated that its camp membership

---

7/ For some denominations, closure of their affiliated school would offer no alternatives within which to learn the tenets of their particular religious tradition. For example, North Park College in Chicago, Illinois is the only college or university in the country affiliated with the Evangelical Covenant Church. Likewise, Trinity International University in Deerfield, Illinois is the only college or university affiliated with the Evangelical Free Church of America.

would be faced with a total annual tax bill of close to $22 million if all were to lose their property tax exemption.

Importantly, the camps in the NAE and CCI are not just sports camps. They are also places of Bible instruction, prayer and worship. They serve an avowedly religious function not for the benefit of the institution, but for the benefit of the people who come from everywhere to join in a common religious experience. A loss of tax exemption, especially property tax exemption (camps typically own large tracts of land) would be devastating to organizations which barely can afford to operate now.[8/]

C. Many Charities And Religious Groups Serve Significant Numbers Of Out-of-State Citizens And Would Be Threatened By State Statutes Penalizing Interstate And International Ministry.

The very purpose of a religious camp or retreat center is to attract people from all over to share a common religious experience in a place removed from their everyday lives. Thus, by definition, a camp will serve a large proportion of people who are residents of other states or countries. As pointed out in the petition (at 2), 95% of the people served by the petitioner in this case crossed state lines to attend.

The same is true for colleges and universities. Among the 90 members of *amicus* CCCU, many of the students come from other states or countries. These students seek out the institution of their choice for both academic and religious

---

8/ Indeed, many camps lose money, and are supported by other church institutions. This support is not without limits, and often would not cover the cost of property taxes. Moreover, this support frequently comes from a religious denomination or national support organization. If the camping constituency were limited to in-state participants, the out-of-state supporters that financially make up the operating deficit would be discouraged from giving to a camp that they would be discouraged from attending.

reasons. For example, Wheaton College, an independent evangelical college in Wheaton, Illinois, draws from all 50 states and 51 countries. Of its 2,650 students, over 75% come from outside Illinois. Wheaton College's 80-plus acres and 1,450,000 square feet of buildings would face a staggering property tax bill if the college lost tax exemption.[9/]

For Christian colleges and universities, a nationally-diverse student body is not only a theological and practical goal, but is in fact the norm. Gordon College, an independent evangelical college in Wenham, Massachusetts, draws 66% of its 1,200 students from 27 countries and 39 states other than Massachusetts. Taylor University, an evangelical school with campuses in Upland, Indiana and Fort Wayne, Indiana, draws 65% of its 1,892 total student body from the 49 states other than Indiana and from the District of Columbia. Anderson University, affiliated with the Church of God in Anderson, Indiana, draws 45% of its 2,245 students from 48 states other than Indiana and from 15 foreign countries. Nyack College, a Christian & Missionary Alliance college in Nyack, New York, draws 44% of its 1,100 students from outside New York, including 33 states and 23 countries. Houghton College, mentioned above, draws 38% of its 1,356 students from 20 countries and 34 states other than New York. George Fox College, with 1,650 students in Newberg, Oregon, is affiliated with the Evangelical Friends International of North America (Quaker) and draws 32% of its students from 12 countries and 30 states other than Oregon.

Tax exemptions are also critical to religious and charitable social service organizations. The social service organizations of *amicus* NAE, such as the Salvation Army, serve approximately 20 million people. These organizations operate soup kitchens, shelters, counseling services and other

---

[9/] As the petitioner notes, even Maine's most prominent institutions of higher learning draw almost 90% of their students from out of state. *See* Pet. 14 n.32.

ministries to the poor. In many urban locations, the metropolitan area of a city will encompass two or more states.[10/] A charity operating in "the City" may serve people from many states.[11/] These operations would be threatened by statutes like Maine's. They would either have to demand identification and reject the non-resident poor, an alternative which is inimical to their religious beliefs and virtually impossible to enforce, or they will have to move to locations where the poor of other states cannot reach them.

International aid agencies would likewise suffer if other states were permitted to follow Maine's example. For example, NAE member Compassion International, a major international relief ministry headquartered in Colorado Springs, Colorado, sends 99% of its funds overseas in some form of financial assistance or aid. A revocation in Compassion's property tax exemption for its headquarters would result in a several hundred thousand dollar expense and a severe cutback in support to needy children overseas. Likewise, World Vision, an evangelical relief agency headquartered in the State of Washington, sends 99% of its assistance to people outside the United States. World Vision would be forced to limit the funds sent to needy children worldwide if forced to pay the estimated $70,000 per year it would owe in property taxes.

Amicus World Relief is an international relief agency for the poor of the Third World. World Relief is headquartered

---

[10/] For example, the New York area consists of New York, Connecticut and New Jersey. The Philadelphia area consists of Pennsylvania, Delaware and New Jersey. Even the District of Columbia metropolitan area consists of the District, Maryland and Virginia.

[11/] Gospel Mission, a religiously-affiliated drug treatment center for homeless men in Washington, D.C. has been nationally recognized as a private-sector success story. Gospel Mission routinely helps men from outside the District, and even outside the D.C. metropolitan area.

in Illinois, where it has exemption from state and local taxation. It raises funds from evangelical churches around the country, and ministers to the poor overseas by sending funds, medical supplies and other resources. Last year, World Relief raised over $24 million for relief and refugee projects, of which $934,367 was raised by donors in Illinois. However, only $5,634,00 of the budget was spent for refugee assistance and relocation in Illinois; $10,250,968 was sent to 13 other states for resettlement activities. Moreover, another $6,245,252 was sent directly overseas for relief and development activities in 22 foreign countries. If the Maine regime is upheld, Illinois could presumably revoke tax exemption for World Relief simply because the charity was not serving primarily Illinois residents.

Other major U.S. ministries would suffer as well. NAE member Focus on the Family, an international family-support and assistance ministry headquartered in Colorado, receives donations from and is active in all 50 states and 15 foreign countries. Prison Fellowship, an evangelical support ministry for prisoners and their families based in Virginia, is involved in all 50 states and spends 90% of its funds outside Virginia. The obligation to pay an estimated $60,000 in property taxes would curb the important religious and social services provided to inmates and their families.

If this Court upholds Maine's statute, and other states are permitted to enact similar statutes, even religious denominations may lose their state and local tax exemptions. The NAE member denominations all have tax exemptions in their respective states and localities. Yet, each serves a population far broader than the citizenry of its home state. Some of the member denominations are worldwide. A statute denying tax exemption for service beyond the state's border not only would harm such denominations, but would also infringe on their rights to freely exercise their religion, in that tax benefits would be lost as a result of religious

activities with anyone outside of the state.[12/] States simply do not have the power to inflict such a penalty on activities like overseas food relief, missionary activity or Bible teaching. *See supra*, pp. 10-13.

As this Court has held:

> [t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint. For * * * "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

Follett v. McCormick, 321 U.S. 573, 577 (1944) (citations omitted).

II. MAINE'S STATUTE VIOLATES THE COMMERCE CLAUSE BECAUSE IT IMPERMISSIBLY DISCRIMINATES AGAINST IN-STATE ENTITIES AND OUT-OF-STATE CITIZENS ENGAGED IN INTERSTATE COMMERCE.

A. The Purpose Of The Commerce Clause Was To Create A National Free Market In Which States Could Not Discriminate Against Interstate Commerce.

Under the Articles of Confederation, the United States experienced a post-war economic depression in the 1780s. 3 William W. Crosskey & William Jeffrey, Jr., *Politics and the Constitution in the History of the United States* 165-66 (1980). *See also United States v. The William*, 28 Fed. Cas. 614 no. 16700 (D. Mass. 1808)("It is well understood that the depressed state of American commerce, and the complete experience of the inefficacy of state regulations, to apply a remedy, were among the great, procuring causes of

---

12/ Even a church located in a downtown area could lose tax exemption if its members were drawn mainly from a suburb that happened to be in another state.

the federal constitution"). The lack of centralized regulation of commerce among the former colonies exacerbated the economic situation because each state passed measures and countermeasures designed for economic self-protection, aggression or retaliation. 3 Crosskey & Jeffery, *supra*, at 165-66. This resulted in economic Balkanization of the new states:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended until they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Federalist No. 22 (Hamilton) (C. Rossiter ed. 1961). *See also* James Madison, *Debates in the Federal Convention of 1787* (Aug. 29, 1787), at 632 (quoting Mr. Pinkney, "States pursue their interests with less scruples than individuals").

Popular sentiment in favor of a stronger and more enforceable national power over commerce was expressed in several former colonies. For example, in Massachusetts in 1789, a group of Boston merchants and tradesmen met to urge the Massachusetts legislature to give Congress full powers to regulate the internal as well as external commerce of all of the States, to "reach the mischiefs we complain of." 3 Crosskey & Jeffrey, *supra*, at 172. In New York, the Chamber of Commerce presented the New York legislature two memorials which urged that the "sole" power of regulating the commerce of the United States be granted to Congress. *Id.* at 166. In the same year, a committee from Philadelphia sent a memorial to the Pennsylvania legislature complaining that a fundamental defect in the Articles of Confederation was that Congress had not been given "a full and entire power over the commerce of the United States,"

and that for want of such a power the whole country was in "a very singular and disadvantageous situation," and the "intercours[e] of the States [was] liable to be perplexed and injured by various and discordant regulations instead of that harmony of measures on which the particular as well as the general interests depend." *Id.* at 167 & n.9.

Dissatisfaction with the inadequate power of the federal government on economic and other fronts led to the Constitutional Debates in 1787 and the eventual drafting and passage of the present Constitution. *Federalist No. 42* (Madison) (C. Rossiter ed. 1961) ("[a] very material object of this [commerce] power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter").

Contemporary records reveal the central importance the Framers placed on preventing the Union from becoming a fragmented, hostile and competitive grouping of miniature economies that would inevitably sever themselves from each other. As Madison put it:

> I conceive it to be of great importance that the defects of the [present] federal system should be amended, not only because such amendments will make it better answer the purpose for which it was instituted, but because I apprehend danger to its very existence from a continuance of defects which expose a part if not the whole of the empire to severe distress.

Letter from James Madison to James Monroe, Aug. 7, 1785, *Papers* 8:333-36. The Framers were convinced that the most effective way to prevent economic chaos was to grant primary power over commerce to the national government so that local political forces could not impose unequal burdens on interstate transactions. To that end the Framers adopted, among other things, the Commerce Clause. 4 *Letters and Other Writings of James Madison* 15 (1865) (power had been granted Congress by the Constitution over interstate com-

merce mainly as a "negative and preventative provision against injustice among the States").

Since the early days of the republic, this Court has construed the Commerce Clause to limit the power of individual states to economically burden the national free market by discriminatory treatment of any phase of interstate commerce, whether in an effort to help the local economy or cure a local problem. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 11 (1824) (power of Congress under the Commerce Clause extends to matters that take place intrastate); *Guy v. Baltimore*, 100 U.S. 434, 439-40 (1879) (no state may impose a more onerous burden or tax on the products or persons of other states, than it has on its own products or citizens); *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891) (states cannot deprive persons of their right to carry on interstate commerce); *St. Louis & E. St. L. Elec. R.R. v. Missouri*, 256 U.S. 314, 318 (1921)(state may not, in the guise of taxation of real property, compel a corporation to pay for the privilege of engaging in interstate commerce); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 403 (1984) (state cannot impose tax which discriminates by providing advantages to local enterprises); *West Lynn Creamery, Inc. v. Healey*, 114 S. Ct. 2205, 2216 (1994) (state imposition of differential burden on any part of or party to the stream of commerce is invalid).

As shown below, Section 652 is in stark derogation of the Framers' intent to prevent economic Balkanization.

B. The Statutory Language And Legislative History Of Section 652 Betray Its Discriminatory Purpose And Effect.

Section 652 provides that property tax exemptions otherwise available to "benevolent and charitable" institutions will be denied to any such institution "that is in fact conducted or operated *principally for the benefit of persons who are not residents of Maine*." Me. Rev. Stat. Ann. tit. 36, § 652(1)(A)(1)(1964 & Supp. 1994)(emphasis added).

If it were not already apparent from the statute itself, Section 652's legislative history establishes conclusively that the purpose of the statute was to alleviate local problems at the expense of interstate commerce. As one Maine legislator said:

> I can tell you the reasons for the bill. * * * [T]his particular bill * * * is for those institutions that are set up within the State of Maine by out-of-state people for out-of-state people. That is the main goal of this particular bill.

Pet. App. 24a-25a. As another legislator explained, "*I don't believe that this will affect any business that is in the State run by anybody that is in this State.*" *Id.* at 28a (emphasis added). One lone legislator argued:

> Personally, it seems to me that where we are a vacation state and you are saying here that if it is conducted for the benefit of persons who are not residents of Maine, *it is discriminating against the people who come to our state*.

Id. at 22a (emphasis added).

Section 652 penalizes tax exempt entities that choose to enter the stream of interstate commerce; it impedes the access of nonresidents to camping within the state. The trial court found that Section 652 confers an economic advantage on institutions that serve primarily in-state residents and confers a comparable economic disadvantage on institutions that serve primarily out-of-state residents. Pet. App. 15a, 17a. It also found two other significant facts: that in the case of the petitioner camp, the increased costs incurred by reason of Section 652 would be passed along to out-of-state campers, and that this increase in costs would impede interstate travel by campers by effectively preventing them from attending the camp. This compels the conclusion that the statute creates a direct burden on commerce and is thus invalid.

C. Section 652 Is Per Se Invalid.

Both discriminatory tax exemptions and discriminatory taxes impermissibly burden interstate commerce. *West Lynn Creamery*, 114 S. Ct. at 2220 (Scalia, J., concurring); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984)(tax exemption for local products violates Commerce Clause when not applicable to local sales of out-of-state products); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 125 (1908)(property tax exemption favoring local businesses violates Commerce Clause). A taxation scheme impermissibly discriminates when it treats in-state and out-of-state economic interests in a manner which benefits the in-state interests and burdens the out-of-state interests. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 114 S. Ct. 1345, 1350 (1994); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("[e]conomic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States"). The protective scope of the Commerce Clause encompasses all phases of a commercial transaction and all parties involved, whether sellers or consumers. *Oregon Waste*, 114 S. Ct. at 1350; *West Lynn Creamery*, 114 S. Ct. at 2216; *Bacchus*, 468 U.S. at 269.

The plain language of Section 652's exemption scheme discriminates against "sellers" (*e.g.*, universities or camps) who transact interstate business and, ultimately, against their out-of-state "customers" (*e.g.*, students or campers), solely because of the geography of their transactions and the residence of the consumers. By penalizing charities who serve out-of-state residents, Maine in effect taxes interstate commerce itself. The state also places a burden on non-residents who must now pay more for the "privilege" of travelling to Maine for an education, to worship or to receive

charity from a Maine organization.[13] If all states adopted similar statutes, religious, charitable and educational institutions would become parochial, as they and their beneficiaries could no longer afford to venture beyond the state line.

This Court repeatedly has struck down such facially discriminatory protectionist measures as *per se* invalid under the Commerce Clause. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848 (1996); *Oregon Waste*, 114 S. Ct. at 1358; *Bacchus*, 468 U.S. at 270-71 (where legislative history showed tax exemption scheme intended to favor local interests, a flexible approach to analysis of scheme inappropriate). Such a facially discriminatory tax will be upheld only where, under the strictest scrutiny, a state can prove that the facially discriminatory tax is designed to further a legitimate local purpose that cannot be served by a non-discriminatory alternative. *Oregon Waste*, 114 S. Ct. at 1351.

Here, that is not possible. Maine cannot present any non-discriminatory purpose for Section 652; its sole purpose is to increase revenue by taxing only transactions with out-of-state consumers. Nor has Maine demonstrated that no non-discriminatory means are available to supplement local government revenues. Indeed, Maine could just as easily have decided to raise property taxes across the board, to

---

[13] Commerce Clause protection extends to the right of interstate travel for commercial and recreational purposes. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-56 (1964); *Edwards v. California*, 314 U.S. 160, 171 (1941). Indeed, the right of interstate travel for any legal purpose whatsoever is recognized as a fundamental right which is protected by the Constitution. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 380 (1979). This right is especially precious to *amici*, whose constituents travel to or associate with them in pursuit of their free exercise of religion. *See supra*, pp. 17-21.

remove all exemptions for not-for-profit entities[14/] or to adopt some other independent, but non-discriminatory tax.

D. The Supreme Judicial Court's Analysis Was Flawed.

Despite the unambiguous, discriminatory language of Section 652, the blatant legislative goal of attempting to cure local income problems at the expense of out-of-state consumers so clearly articulated in the statute's legislative history, and the Supreme Judicial Court's own acknowledgement that Section 652 would increase costs to out-of-state campers, the court held that Section 652 had a no more than an "incidental" effect on interstate commerce and regulated "even-handedly." Pet. App. 6a. Consequently, the court below concluded that Section 652 did not impermissibly burden interstate commerce in violation of the Commerce Clause. *Id.* at 6a-7a.

This judgment effectively subordinates interstate commerce to local revenue generation. Consequently, it must be overturned. The Commerce Clause protects consumers and their service providers, as well as out-of-state businesses. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982) (a state may not give its residents preferred right of access over out-of-state consumers, to natural resources of state). Thus, a state may not burden movement across state lines or the right of sellers and consumers to engage in interstate transactions.

The Maine Supreme Judicial Court held that Section 652 does not favor in-state interests because it does not increase the cost of doing business for out-of-state camps or cause out-of-state camps to leave the market, and because charitable institutions can qualify for an exemption by "choosing to dispense the majority of their charity locally." Pet. App.

[14/] An alternative we do not favor and which raises concerns under the First Amendment's Religion Clauses, but which at least would not implicate the Commerce Clause.

6a. This reasoning fails because it completely ignores the burdens imposed by the statute on interstate *consumers*. These burdens are no more valid under the Commerce Clause than burdens on out-of-state businesses. The net effect of Section 652 is, as recognized by the Maine Supreme Judicial Court, to increase the costs to (and thus to discriminate against) all out-of-state consumers of services provided by Maine's not-for-profit organizations.

Even more absurd is the Maine court's statement that Section 652 is even-handed and non-discriminatory simply because the petitioner can qualify for an exemption by choosing to serve Maine residents. Pet. App. 6a. This merely demonstrates how severely the statute discriminates. First, it acknowledges an economic penalty for engaging in interstate commerce. Second, it ignores the burden on citizens of other states who wish to cross the Maine border to purchase a service; a right accorded the same protection as the right to cross state lines to make a sale.[15/] A tax which prevents either of these from occurring is facially discriminatory. The court below thus erred in not applying the *per se* rule of invalidity.

E. Section 652 Is Invalid Even Under A Flexible Approach.

Even under the flexible analysis advocated by the Supreme Judicial Court, Section 652 is invalid.[16/] *West*

[15/] Of course, for *amici*, this right is also the right to cross state borders to worship in common or to give or receive charity.

[16/] The flexible approach is not available to Maine in this case because it has failed to advance other legislative objectives and because the statute does not regulate even-handedly. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 343 n.5 (1992); *Brown-Forman*, 476 U.S. at 579. As previously discussed, Section 652 patently discriminates against interstate commerce and the only legislative objective

(continued...)

Lynn Creamery, 114 S. Ct. at 2216 (Commerce Clause prohibits forthright or ingenious discrimination; statute will be invalid when its practical operation discriminates against interstate commerce); *Brown-Forman*, 476 U.S. at 580 (state must demonstrate that its interest is legitimate and that the burden on interstate commerce does not exceed local benefits). Here, the Maine legislature did not consider any alternative ways to compensate for revenues lost by granting property tax exemption to charitable entities that serve out-of-state residents. The burden on interstate commerce effected by Section 652 is substantial, not incidental. It penalizes commerce with non-residents. Not only does this increase costs to out-of-state consumers, but it burdens their right to travel to enjoy the resources of other states. Here, this is especially alarming because the purpose of the travel is to join in a religious experience. The purported benefit of Section 652's incremental increase in local revenues cannot justify these burdens. There are any number of permissible ways to increase revenues, or to spread the burden of taxation more broadly. What the state may not do is employ a means that discriminates against transactions in interstate commerce.

CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

---

[16](...continued)
articulated for the statute was to gain additional revenue from those who engage in interstate, as opposed to intrastate, transactions.

Respectfully submitted.

STEVEN T. MCFARLAND
Center for Law and Religious Freedom, Christian Legal Society
4208 Evergreen Lane
Annandale, Virginia 22003
(703) 642-1070

JAMES C. GEOLY
Counsel of Record
KEVIN R. GUSTAFSON
MARLAINE J. MCVISK
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amici Curiae

MAY 1996